Manitoba
Agriculture

FARMER'S LEGAL HANDBOOK

November, 1991

FARM BUSINESS MANAGEMENT

Acknowledgements

Special recognition is attributed to Public Legal Education Activities (PLEA) for sponsoring the first publication "Manitoba Farmers and the Law, " which was written by Gerald Ashcroft. We are also grateful to the law students for revising and updating the current version which has been renamed "Farmer's Legal Handbook." It has been renamed to reflect its value as a reference manual in legal matters for farmers, students and the rural community.

Special thanks are extended to Professor Charles F. Framingham, Department of Agricultural Economics and Farm Management, University of Manitoba, for editing the final draft for its legal and economic content.

To Val Goodwin, a freelance communication consultant, for editing and organizing the manuscript in a format that is easily understood by those not in the legal profession.

Special thanks are extended to Jacqueline Dewar, for typing and retyping, and proofreading the final version to assure clarity and accuracy.

Valuable contributions were made by G. A. Therrien, Chief, Farm Management Section, and Lorne Martin, Farm Management Specialist, Manitoba Agriculture, in assuring that the material was relevant to the farm family.

Note To Handbook Users:

This publication has been prepared to give a general view of the major legal factors affecting the farm and farm family. It was not designed to represent a complete and precise statement of the law. The law, as presented, may be changed in some cases by subsequent decisions, court rulings and enactments. Therefore, the material should always be used in conjunction with current Acts, court decisions and special assistance from lawyers.

This material is intended as a general guide for farmers, and should not be used to resolve specific legal problems that may require special considerations and qualified interpretation from lawyers, accountants, tax advisers and financial consultants.

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Contract Law

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Contract Law

What Is A Contract?

A contract is an agreement or promise between two or more persons that the law will enforce. It can be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or can be implied from the conduct of the parties.

There are **two types of contracts**. The most common is a **bilateral** contract, in which the parties exchange promises and agree to terms before the contract is performed. The second type is a **unilateral** contract, where an offer is made to society and is then accepted only through action. Good examples include vending machines or a reward advertised for the return of some lost item.

To create an enforceable contract, a number of factors, including the following must be present:

- There must be a valid **offer and acceptance** of that offer.
- There must be a promise to do something (called a **"consideration"**) from each party.
- The parties must have the **legal capacity** to make a contract.
- The parties must intend to be **legally bound** by the agreement.

Contracts

What Is The Procedure For Offer And Acceptance?

- **Offer**

One party, the "offeror," makes an offer and looks for acceptance from the "offeree," the person to whom the offer is made.

An offer becomes definite when the offeree promises to be bound, provided all the important terms of the offer are agreed to by the offeree. The offer does not have to be in writing, but it must be definite and for specific property, goods, or services.

An offer can also be expressed by conduct without words. For example, the gestures of floor traders at the Winnipeg Commodity Exchange represent an offer.

However, not every suggestion that you are willing to sell or do something is an offer capable of acceptance. There is a distinction in contract law between an offer and what is called an "invitation to treat." An invitation to treat refers to the preliminary statements or negotiations that take place before the offer is made, and is, in effect, an invitation to do business. A statement such as "I'm thinking about selling my tractor -- how much do you think it's worth?" would be an invitation to treat rather than an offer.

Store displays, advertisements, circulars, calls for tenders, public auctions, and quotations of a price at which one would be willing to sell are generally considered to be invitations to treat, and not offers.

An offer must be communicated to the offeree before it can be accepted by the offeror. For example, a person may find and return a lost article to its owner and afterwards learn that a reward has been offered for its return. The finder is not entitled to the reward because he/she did not act in response to the reward offer. Similarly, we cannot be obligated by people who do work for us without our knowledge.

- **Acceptance**

Acceptance occurs when the offeree agrees to all of the proposed terms without qualification or addition. When that acceptance has been made, a binding contract has been completed.

It is important to note that in order to be binding, this acceptance must be communicated to the offeror. Words ("I accept") or actions (returning the item

advertised as lost) will do. Silence cannot be taken as acceptance of the offer *unless* the parties have habitually used the method in previous transactions, or have agreed in advance that silence shall be sufficient.

Communication need not be in writing to be satisfactory. Generally, acceptance should take the same form as the offer. If an offer is made over the phone, acceptance should be communicated over the phone. However, if you have specified that the acceptance must be communicated to you in some special manner, such as in person or by telegram, then the offeree must comply with those instructions for there to be a valid acceptance.

If the offer was mailed, the acceptance can be mailed, but there is a special rule applying to acceptance by mail. The "postal rule" says that the moment the acceptance is dropped in the mailbox, the offer is accepted and the contract is formed. When an offer indicates that acceptance should be made by some means other than mail, it can still be mailed, but the offeror would not be bound until the acceptance reaches him/her. For example, many of the contracts carried out with the Manitoba Crop Insurance Corporation take effect on the postmark date. Autopac clearly retains its right to discontinue your insurance coverage if mailed payments are not received on time.

An offer can be accepted by the person(s) to whom it is made, or by his/her agent. An offer made to the general public can be accepted by anyone who fulfils the conditions of that offer (for example, anyone who returns an item that has been advertised as lost).

- **Counter-Offer**

One of the basic rules of contract law is that the acceptance must be identical to the offer; the offeree cannot accept only part of the offer or add new terms when accepting. If so, the offer becomes a counter-offer -- which is defined as a rejection of the old offer and the making of a new one. This automatically ends the original offer, which can no longer be accepted -- unless it is made again.

An example of a counter-offer would be if someone said to you: "$20,000 is too much for your tractor that you want to sell. I would be willing to give $19,000." That person becomes the offeror and you the offeree. You may then choose to accept or reject the counter-offer, to repeat the original offer, or even to propose yet another counter-offer.

It is important to note that an inquiry regarding the possibility of better terms is not a counter-offer and does not terminate the original offer. It merely asks whether the offeror might be interested in modifying the original offer. "Is that your bottom price?" would be an illustration of this.

- **Rejection**

An offer has been rejected when the offeror is justified in believing, based on the offeree's words or conduct, that he/she does not intend to accept the offer. Once rejected, an offer is closed forever (unless it is re-made). The offeree cannot later change his/her mind and accept.

- **Time Lapse**

If an offer is stated to be open for a fixed time, then it cannot be accepted after that time. If no time is specified in the offer, it lapses after a "reasonable time" -- depending on the type of contract and the circumstances. These could include an offer that contains perishable commodities or commodities that fluctuate in price, an offer whose wording indicates urgency, or one that is made in such a way as to indicate urgency.

Generally, reasonable time for a verbal offer is less than for a written offer. Reasonable time for acceptance in the case of an offer implied from the conduct of the parties is normally very short. For example, an offer implied by raising a finger at an auction would generally only be valid in the time prior to the close of sale for the article being auctioned.

- **Revocation**

Revocation is the withdrawal of an offer by the offeror, so that it can no longer be accepted. The withdrawal may be made verbally or in writing, or it may be implied by action -- but the offeree must be made aware that the offer no longer stands. If revocation is made by mail, it is only effective when the notice is received by the offeree at his/her usual address.

An offer can be withdrawn any time prior to acceptance, even before the time limit expires, unless the offeror has received payment to indicate that it will remain open until a certain time -- which takes the form of a related contract called "an irrevocable option to purchase."

- **Failure Of Conditional Offer**

The offeror is free to indicate that his/her offer is only open for acceptance under certain circumstances. If these conditions don't exist, the offer cannot be accepted. For instance, an offer to sell goods may only remain open while supplies last.

- **Death or Mental Incapacity**

An offer may lapse if either of the parties dies or becomes mentally incapacitated prior to acceptance. In circumstances where the offer is independent of the offeror's personal participation, and can be satisfied out of the offeror's estate, death does not prevent acceptance.

What Is "Consideration"?

A contract is a bargain, and for it to be enforceable, all parties must do something in return for the promise obtained from the other party. This price is called "consideration" in legal terms; and, *is essential* to make a contract binding in law. A promise made in the absence of a bargain is called a "gratuitous promise," and does not constitute a contract, nor is it enforceable by law. It should be noted that the consideration in some contracts could be the promise *not* to do something one of the parties might otherwise be entitled to do.

In a **bilateral contract**, (see "What Is A Contract?") one party's promise is the consideration paid for the other party's promise. For example, in a contract of sale, the seller's consideration is a promise to provide specific goods, while the buyer's consideration is the promise of a specific sum of money.

In a **unilateral contract**, such as where a reward is offered for the return of a lost item, the consideration given by one party is the time and effort spent in doing what the offeror wanted (returning the lost item), while the consideration given by the offeror is the reward money.

The parties to a contract are allowed to decide the form and amount of consideration -- even if it is not a "fair" value. Just because a bad deal is made, it does not mean there is no contract. However, a court may rule that the promise is void if consideration is grossly inadequate, *and* other evidence points to fraud, duress, or undue influence exerted on one of the parties.

There is one exception to the requirement of consideration, and that is when a contract is "under seal"; then, no consideration is necessary. A contract is under seal when it is formally written and has either an actual seal impressed or affixed to the paper at the time of signature, or the word "seal" appears close to the signatures of the parties. The seal says, in effect: "I fully intend to be bound by this promise." Putting a document under seal makes a contract legally binding, and eliminates the need for consideration.

What Is "Legal Capacity"?

Certain classes of people lack the capacity (ability) to enter into contracts that will be binding on them.

- **Minors (Infants)**

In Manitoba, anyone under the age of 18 is called a minor or an infant. The general rule is that most minor's contracts are not enforceable against the minor, but he/she can enforce them against the other party to the contract. However, there are exceptions to this general rule. Contracts for "necessities of life" -- items such as food, clothing, housing, medical attention, legal advice, and transportation -- are enforceable. A minor is bound to pay a reasonable price (consideration) for all necessary goods he/she needs, but this consideration may not be the same as the contract price.

A minor is also bound to the terms of "beneficial contracts of service," which are business service contracts deemed to be for his/her benefit. An example is a contract associating a minor with a trading or business venture. However, the courts have largely restricted the enforcement of these contracts to those of employment or apprenticeship, and then only when they are considered to be beneficial -- not exploitive.

- **Insane Persons**

To enforce a contract against a person, it must be proven that the person was capable of understanding what he/she was doing when the contract was signed.

- **Indians - Reserve Land**

Indians living on reserves are wards of the Crown, and the reserve land is held by the Crown in trust for the benefit of the Indian band. The land is not available as security for the claims of creditors, and selling or giving it to an outside party is void unless the transaction has been approved by the federal minister of Indian and Northern Affairs. Indians not living on a reserve can enter into contracts involving their own property in the same manner as any other citizen.

What Is "Intent To Be Legally Bound"?

Even when an apparently-valid offer has been accepted and consideration (payment) is present, there may still be no contract. For example, if two people agree to have dinner, they probably have no intention to be legally bound. Therefore, no legal obligations are created. Both parties must intend to create a legally binding agreement before a contract can be enforceable by law.

Sometimes, parties will specifically state that an agreement either will or will not be legally enforceable, but in most cases, there is no such statement. If there is

a dispute, a court of law must determine their intention based on language they used and the circumstances in which they used it, as well as the subject matter of the contract (dinner invitation versus land sale), the nature of the transaction, the form used, and the relationship between the parties. In the absence of clear evidence to the contrary, agreements between family members are presumed not to be legally binding, but agreements between total strangers -- especially commercial ventures -- carry a strong presumption that the parties intended to be legally bound. A court can use the objective test of the reasonable bystander: if, to such a person, the *outward* conduct of the parties showed a serious intention to make an agreement, then in the eyes of the law, a legally binding contract results.

Should A Contract Be In Writing?

In general, no particular document is required. Insurance contracts, and contracts for the sale of new farm machinery and equipment, must be in writing to be valid and enforceable, but the majority of other contracts do not. However, all but day-to-day contracts (buying gas) should be put into writing because it makes it much easier to prove that a contract exists, and it may prevent future misunderstandings. To sue or be sued under a contract, you must be a party to it, and the best way to prove this in the future is to have all parties sign it.

What Is Part Of A Contract And What Is Not?

The words the parties use, whether written or spoken, are the "express terms" of a contract. However, in some cases, implied statements or those made prior to the contract could be a part of it, whether or not you have included them as express terms.

If a dispute arises, the decision on whether an implied term is part of a contract will be made by a court of law, or in some cases, by existing laws. For a court to make a ruling that an implied term is part of a contract, the term must be both obvious and necessary -- something the parties would have agreed to if it had occurred to them. Such rulings are usually based on long-established customs in a particular trade or type of transaction.

The Sale of Goods Act and the Consumer Protection Act say that certain terms are always implied and are always a part of a contract. Some of these terms are:

- that the seller has a right to sell the goods;
- that the goods will be the same as described;
- that a bulk purchase will be of similar quality to the sample shown;
- that goods are of reasonable quality;
- that goods are new and unused unless otherwise described.

The Seeds Act sets out certain terms for standards, germination, quality, and diseases -- and they are implied, and a part of every contract relating to seeds.

A statement made prior to a contract could be considered a term of the contract, or it could be considered a representation (meaning it is not part of the contract). The determining factor is whether a reasonable person would have taken the statement to be meant as part of the contract. As well, the strength of the statement and the degree of knowledge of the parties involved will also play a part in the decision.

If a pre-contract statement is considered to be part of a contract and it is a false statement, a breach of contract exists (see "Breach Of Contract"), whereas if a false pre-contract statement is considered to be a representation and not part of the contract, the contract could still be valid.

Some statements made prior to a contract are so general and vague that they have no legal affect on a contract at all. This type of statement is called "puffery," and could be something like: "This is the best car you'll ever own."

What If Something Is Missing From A Contract?

Fundamental terms of a contract include: parties to the contract, the subject matter of the contract, the price and duration of the contract. If any of these terms is missing, the contract will not be binding. In a dispute, any other details left out by the contracting parties will be presumed to be what a court of law sees as fair in the circumstances.

If a fundamental term is present, but is unclear, a court of law may or may not rule the contract to be binding. Generally, however, the court will try to make use of and include all terms wherever possible. When local customs or common trade usage give precise meaning to a term, that meaning will usually be adopted and the term considered "certain" (a definite part of the contract).

If a term has been left out to be agreed upon at a later date, and a problem arises, a court will impose terms in some situations -- depending on the nature and importance of the term to be agreed on. The further the parties have gone with their contract, the more likely a court will imply terms and conclude that a contract exists. When an agreement has been acted upon and the parties have been put to great expense in implementation, a court will be reluctant to declare the contract invalid. However, if the progress of the contract is limited, a court could declare it to be a "contract to enter into a contract," which means it is not binding.

If an arbitration clause has been included in the contract, a court will be reluctant to impose terms that an arbitrator could. Arbitration provides a means to allow undecided terms to be decided without court interference.

When Is A Contract Not Valid?

The absence of any key element can make a contract void or "voidable," which means that legally it never existed. These elements are:

- valid offer and acceptance of all the conditions;
- legal capacity of the parties to make a contract;
- a promise (consideration) or signing under seal;
- an intent to be bound by the contract;
- certainty of major terms -- either implied by law, tradition, custom, or defined in the contract;
- no illegalities or components that are contrary to established laws or public policy.

In addition, there are **other circumstances** that can make a contract void (if either party wants it to be void) -- including **misrepresentation, signing under duress, undue influence, false pretences, mistakes and misunderstandings, changes beyond both parties' control,** and **breach of contract.**

- **Misrepresentation**

A false statement of fact made by one party to another is a misrepresentation, and could be the result of fraud, negligence, or an innocent act. If you are selling your used tractor and you say that is has been trouble-free during the time you used it, you have implied that there have been no serious breakdowns and no major repairs. If, in fact, there have been either, you have made a misrepresentation.

If there has been a relevant change in circumstances or quality of goods between the time of negotiations and the time of signing a contract, and you remain silent about it, you could be found guilty of misrepresentation. As well, you would be guilty of a misrepresentation if you remained silent. Where there is a duty to disclose all material facts such as in fiduciary relationships (relationships based on trust). Examples include insurance contracts, business partnerships, and agreements between parent and child or teacher and student.

- **Signing Under Duress**

Duress is either actual or threatened violence used to force or influence a party to enter into a contract. The threat of violence may be directed against the person being coerced to enter the contract, or may be a threat against their parent, spouse, or child. If duress can be shown, the contract can be ruled to be void.

- **Undue Influence**

Undue influence is one party's domination over another party to such a degree that he/she robs the weaker party of their free will. In other words, the weaker party does not end up signing the agreement voluntarily. Undue influence is usually the result of unfair and improper conduct within a relationship of dominance and trust -- such as lawyer and client, parent and child, or religious leader and follower. A contract may be ruled void if you can show there was undue influence, and that you acted promptly to have it withdrawn.

- **False Pretences**

If a person has been persuaded by the false statement of another to sign a written document that is fundamentally different in character from that which she thought she was signing, she can appeal to a court to have the contract made void. An example would be an illiterate person signing a document believing it to be a will, when it is actually an agreement for the sale of land. However, this is a rare situation because the law expects people to read contracts carefully before signing.

- **Mistakes And Misunderstandings**

If both parties misunderstand each other, it is also possible to have the contract declared void. For instance, you might own two trucks and contract to sell one of them to a friend. It would be a misunderstanding if you wanted to sell the Ford truck, and your friend thought he was buying your Dodge truck.

If only one party has made a mistake, but the mistake was known or induced by the other party, a contract can be ruled void. An example would be if you knew your friend thought he was buying the Dodge truck, and you failed to correct him.

- **Changes Beyond The Parties' Control**

A contract becomes invalid if, after the parties have made it, something unforeseen happens that prevents its completion. This would be the case if you had agreed to rent your neighbour's tractor, but it is destroyed by fire before it is delivered to you. The contract is said to have been "frustrated," and you would both be excused from your obligations. However, the contract would not be frustrated if your neighbour caused the fire or knew when she agreed to rent it to you that there was a mechanical problem likely to cause a fire.

- **Breach Of Contract**

If one party does not perform a condition of the contract, this is known as a "breach of contract." If one party is guilty of breach of contract, the other party can be discharged from having to carry out his obligations under that contract.

"Conditions" are terms that are so fundamental to a contract that the breach of one would change the contract substantially. "Warranties" are important, but not as important as conditions.

Breach of a condition gives the victim the right to reject the contract and no longer be bound by it, as well as the right to compensation for damages. On the other hand, breach of a warranty entitles the victim to claim damages but not to cancel the contract. For example, if you have a new truck delivered and a minor accessory is missing, you will probably only receive damages. If it has a smaller engine than you contracted for that would be a breach of a condition and you have the right to reject the truck.

Getting Out Of A Contract

How Can I Get Out Of A Contract?

The most obvious way to get out of a contract is to end it by carrying out your contractual obligations. Once both parties have completed their performance, the contract will automatically end. Another way is if both parties agree to end a contract. As well, both parties can agree to change the original contract; then it ends and a new contract takes effect.

If one party breaches a condition of a contract, then the other party might not have to perform her obligations, and the contract would be over.

If there are sufficient grounds for refusing to complete a contract, you can "repudiate" (refuse to perform) it, and be released from your obligations, thereby ending the contract. However, this decision must be made cautiously because if you wrongfully repudiate a contract you will be liable for breach of contract.

"Rescission" will set aside or void a contract and put the parties into the same position they would have been if the contract had never been made. You have the right to rescind if there has been a misrepresentation, and in some cases, if there has been a mistake. However, this right may be lost if:

- you show intent to proceed with the contract after discovering the problem;
- an unreasonable amount of time has gone by;
- it is impossible to restore the parties to their former position;
- it would cause damage to an innocent third person;
- both parties have already performed their obligations.

What If My Contract Has An "Exclusion Clause"?

An exclusion clause is used to exclude a party from liability for a set of circumstances or for breach (non-performance) of specific terms. However, an *exclusion clause in a contract is not always enforceable.* In some cases, you may be entitled to compensation even where an exclusion clause says that you are not. For example, the exclusion clause will be invalid if one party induced the other party to accept it by misrepresentation or made oral promises that a court decides override the written exemption clause. As well, parties probably cannot exempt themselves from liability for something that is the fundamental purpose of the contract -- for example, liability for selling a car that isn't even roadworthy. Also, most statutory warranties and conditions apply regardless of what the contract says, and cannot be excluded.

If an exclusion clause is unclear, it will be interpreted by a court against the party seeking to rely on it, since it was up to him/her to make it clear.

Suing/Compensation On A Contract

What Should I Know About Suing On A Contract?

- **Length of Time**

Generally, you have six years to sue on a contract -- from the time that the violation occurs. However, there are exceptions. If the violation involves a mistake or fraudulent misrepresentation, the six-year time period begins at the time the mistake or fraud was discovered. The limitation period extends to 10 years if someone is ordered to pay money and they do not.

- **Parties Who Can Sue**

To sue or be sued under a contract, whether it is oral or written, you must be a party to that contract (called "privity of contract"). Persons who had no part in making the contract have no rights or obligations under it.

For instance, if you and your spouse agree to send your mother $200 every month, your mother will not be able to force your spouse to continue making payments if you die. The agreement is between you and your spouse, and your mother is not a party to it. Because of privity rules, it is important that all parties who may want to have future rights under the contract are part of the agreement.

There are at least three ways to become a party to a contract. First, you can participate in making the original contract.

Secondly, you can buy someone else's contract or a part of it (called "assignment") in the same way you might buy property. However, this is limited to situations where it doesn't matter who carries out the contractual obligation; contracts involving personal services or contracts that specifically state that they are not assignable cannot be bought. For example, if you hire someone to work for you, you cannot assign the contract to your neighbour and expect your employee to work for him.

The third way to become part of a contract is through an "agency relationship" -- when you authorize someone else to make contracts for you. Common examples include your employees making purchases on your behalf.

How Can I Be Compensated If Something Goes Wrong With My Contract?

- **Damages**

"Damages" refers to a money award that a court orders to compensate for losses suffered. Its aim is to put the injured party, so far as money can do it, in the position she would have enjoyed had the contract been performed. Damages are awarded when there has been a breach of a condition or warranty, as well as where there has been inconvenience due to delayed delivery of goods, delivery of defective goods, or non-delivery of goods.

- **Restitution**

"Restitution" is awarded by a court and is aimed at putting the parties into the position they would have enjoyed had they never entered into the contract. It is used where a valid contract never really existed -- such as in the case of a mistake. In a buy-sell contract, the seller would get back his goods and the buyer would get back her money.

- **Rejection Of Goods**

The right to reject goods is usually exercised by a buyer when the wrong quality, type, or amount of goods is delivered by the seller. This right of rejection is lost if you accept the goods or sell them to someone else.

- **Specific Performance**

Occasionally, none of the preceding remedies will be satisfactory, and a court will order the parties to do what they promised. For instance, if you contract to buy a specific piece of land and the seller fails to carry out her obligations -- including the transfer of the land to you -- you may prefer to force the land title transfer rather than accept a cash settlement. In this case, a court will weigh the hardship to each party and decide whether to order the seller to transfer the land.

Specific performance will only be granted if damages are not thought to be an adequate remedy. It will never be granted for an employment contract dispute.

When Is There No Compensation If Something Goes Wrong?

- **Promissory Estoppel**

Once someone has indicated (expressed or implied) that they will not insist on their legal rights, they cannot go back and ask for their rights. Estoppel is when a court upholds a promise (expressed or implied) not to enforce strict contractual rights. For example, if you asked your son to advertise -- but not sell -- your car, and then watched while he, in fact, did sell it, you are "estopped" from saying you didn't consent to the sale.

- **Waiver**

A waiver is when you agree to set certain rights aside (you waive them). If you promise to waive your rights under a contract, you usually cannot later change your mind and assert those rights. For example, if you tell a renter that he needs only pay half the regular rent, you may not be able to later demand the full rent without giving the tenant proper notification.

Illegal Contracts

When Is A Contract Illegal?

Some contracts will not be legal -- even if there is a valid offer and acceptance, and all the other requirements are met. A contract is illegal and therefore invalid if it is contrary to established laws or public policy. This includes contracts to commit illegal acts and contracts to prevent persons from marrying.

Sources Of Information:

Ask for the following publications:

- **Contract and Tort Law For Farmers**

  Available from:

  Publications Distribution Centre
  Manitoba Agriculture
  Room 805 - 401 York Avenue
  Winnipeg, Manitoba
  R3C 0P8 or phone 945-3846

  or your local agricultural office

- **Contracts**

  Available from:

  P.L.E.A. Manitoba
  308 Robson Hall
  Faculty of Law
  University of Manitoba
  Winnipeg, Manitoba
  R3T 2N2

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Insurance Law and Procedures

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Insurance Law And Procedures

What Is Insurance?

Insurance is a system of protection against loss in which a person agrees to pay a premium, and in return, an insurance company agrees to reimburse the person for damages in the event of a specific loss. These terms and conditions are outlined in an insurance policy, which is a written contract.

What Types Of Insurance Policies Are Available?

Insurance is available on practically everything. You can get coverage for loss of life, property damage, crop damage, fire, hail, flooding, and even for liability in the event you are sued. It is essential to read your insurance contract so you know exactly what you are covered for. You should ask your insurance agent to explain any parts that you do not understand, and if you are not satisfied with the answers, ask your lawyer, ag. rep. or farm management specialist. You should pay particular attention to exclusions and restrictive clauses that may limit or void your coverage.

Must I Tell The Insurance Company Everything On The Application?

An insurance contract is one of utmost good faith, and *you have a legal duty to disclose all risk factors about which you know -- or about which you might contemplate.* The information you supply must be sufficiently accurate to enable the insurance company to assess the risk it is undertaking, according to the Insurance Act of Manitoba. For property insurance, it states that your contract will be void on any property that is misrepresented or left out. However, for life insurance, any omissions will only void the contract for the first two years.

In other words, you must correctly describe the property or person to be insured. You must not accidentally misstate any important facts that you know about and that the insurance company requires. Of course, you must not intentionally omit to inform the insurance company of any important fact because even an innocent misrepresentation is sufficient for the company to avoid paying on a claim.

If your insurance agent makes a mistake on your application and you sign it, it could create unnecessary problems and may render your policy void. Therefore, a good practice is to spend a few minutes checking the accuracy of the insurance agent's written answers to prevent the possible loss of coverage in the future.

Property Insurance

What Can I Insure?

You can only insure property in which you have an "insurable interest." This means property from which you would legally benefit from its continued existence or suffer a loss from its destruction.

How Much Can I Recover?

The less the property is damaged, the less you will receive from the insurer. The general rule is that you cannot recover more than the property loss or the insured amount, and you usually receive the lesser -- unless you have replacement value insurance. If the total amount of insurance at the time of the loss is more than the appraised value of the property, the excess premium will be refunded.

However, with some policies, you and the insurance company pre-determine the value of the property to be insured. If this property is destroyed, you recover the pre-determined amount, and it does not matter that this pre-determined value is greater than the property's actual value. This is called "a valued policy."

What Happens If I Under-Insure?

If you choose to under-insure your property, you will only receive a proportion of the loss. However, most policies generally require that you insure your property for *at least 80%* of its value.

With some insurance policies, if you do not have adequate coverage, the loss or damage will be divided between you and the company. This is known as "co-insurance," and it is used to discourage under-insuring of property.

You should take care that your appreciating assets (those that increase in value) are adequately covered, instead of simply renewing your policy each year.

Am I Covered By Someone Else's Insurance?

A contract of insurance is a *personal contract*, which means that it is not attached to the object insured. For example, if you recently bought your neighbour's insured tractor and he hasn't cancelled the insurance policy yet, are you covered if it is destroyed by fire before you purchased your insurance? The answer is "no," because *you* don't have insurance. Can your neighbour recover and give you the insurance money he receives? Again, the answer is "no," because after your neighbour had sold the tractor to you he no longer had an "insurable interest" in it.

Can I Insure Property Owned By Someone Else?

Generally, it is not an accepted practice to insure someone else's property. The Insurance Act states that unless otherwise specifically stated in the contract, the insurance company is not liable for loss or damage to property owned by any person not a party to the contract. For example, if you want to insure your neighbour's property (against a fire that starts on your property and spreads), you can, but you must see that your insurance contract specifically states that the insurance also covers your neighbour's property.

Fire Insurance

Am I Insured Against My Own Negligence?

If you negligently cause the destruction of your own property, you are still covered. However, you would not be covered if you *intentionally* caused the destruction.

Am I Insured Against My Neighbour's Negligence?

If you have fire insurance and your barn burns down because a neighbour negligently starts a fire that spreads to your land, your insurance company will sue the negligent neighbour in your name after it has paid you for your loss. This is called "subrogation" -- substituting one person for another in the pursuit of a lawful claim. If you had no insurance, you could sue the negligent neighbour yourself for your loss.

Should I Insure Against Negligent Employees?

It is a good idea to attempt to avoid future problems by insuring yourself and your present and future employees. You could release employees from liability by including it in the terms of their employment contract, but you must first have the consent of your insurance company. Otherwise, if your insured barn burns due to a negligent employee, you will still be insured but your insurance company may want to sue the negligent employee.

What Do I Do If I Have A Fire?

Once damage has occurred, you must take all reasonable steps to prevent further damage. Your insurance company should contribute to any reasonable and proper expenses resulting from you having done this.

How Long Do I Have To Make A Claim?

It is critical that you make the claim as soon after the loss as possible.

What If I Alter My Property After Insuring It?

Whenever you make significant changes that may alter the risk or value of your property, it is your responsibility to inform the insurance company according to the Insurance Act of Manitoba. Significant changes include changes in use or structure, or the storage of dangerous products in a building where they were not previously stored. Some examples include:

- starting up a daycare or farm vacation business;
- leaving a building vacant (unoccupied) for 30 days or more;
- storing gasoline or fuel in or near a building where it was not stored before;
- installing a fireplace or wood stove.

Changes that my decrease your insurance premium should also be reported, such as changing your shingles from wood to asphalt.

Liability Insurance

What Is Liability Insurance?

As a farmer, you may be responsible to others for consequences resulting from your ownership of farm land, your farming operation, or your personal acts. You can protect yourself from these "liabilities" with liability insurance -- purchased separately or as part of a comprehensive package. You should read your policy to see exactly what you are and are not covered for.

What Does Liability Insurance Protect Against?

Liability insurance protects you against unfortunate events, involving you or your farm, that could potentially cause a legal action to be brought against you. These include:

- farm machinery involved in an accident on a public road;
- stray animals causing a vehicle accident on a public road;
- crop spray damage to a neighbour's crop;
- accidentally burning a neighbour's crop;
- accidentally shipping grain with traces of treated kernels;
- employees injured on the job;
- your accidental injury of someone else;
- accidental injury of a visitor on your farm.

What Does The Insurance Company Need To Know?

You must tell the insurance company about any activities that go beyond the normal production and marketing of your own agricultural products. This includes any activity that may increase your risk of liability to others:

- custom work done for others (seed cleaning, livestock feeding, welding);
- horse boarding or training;
- operating a farm vacation facility, day care service, or U-Pick operation;
- direct retailing of farm products.

Failure to inform your insurance company of any of these activities may leave you unprotected in the event of a claim.

Crop Insurance

What Is Crop Insurance?

Crop insurance protects you from crop losses due to uncontrollable factors such as weather and insects. Participation by the federal and provincial governments make crop insurance available to farmers at a much lower rate than would otherwise be possible. The federal and provincial governments share premiums and administration costs.

Why Do I Need It?

As a farmer, you have a significant cash investment in your crop. This investment is at a considerable risk when you think about all of the natural hazards (weather, disease, pests) that can restrict or destroy yields. Crop insurance can help protect you from losses due to crop damage.

What Do I Need To Know About Crop Insurance?

It is worth special mention that dates are key components in crop insurance contracts. There are specific deadlines for application, seeding, and claims, and they must all be carefully observed.

Am I Eligible For Crop Insurance?

All farm operators and crop share landlords are eligible for crop insurance, but they must be financially independent of all other insured farmers. This means that if you live with another insured farmer, you may be required to prove that you are financially independent. When a corporation applies for insurance, the principle shareholder must be financially independent from other insured farmers.

Partnerships (people who hold land together and share production from the insured land) are also eligible for crop insurance, but only as a partnership -- and not individually.

What Specifically Does Crop Insurance Protect Against?

Crop insurance protects against all natural hazards that are beyond your control, but not against losses due to negligence or poor farming practices. Uncontrollable natural hazards include hail, frost, drought, excessive heat, excessive moisture/rainfall, flood, wind (including tornadoes), disease (including rust), pests, wildlife, and waterfowl. In addition, optional insurance is available to protect unseeded acreage against inability to seed due to excessive moisture, and to protect forage crops and seed crops (alfalfa, timothy). Hail spot loss and additional hail insurance are also available as options.

Where Do I Apply For Crop Insurance?

Crop insurance is available from the Canada-Manitoba Crop Insurance Corporation. Applications can be obtained at local agency offices in Altona, Beausejour, Birtle, Carman, Dauphin, Deloraine, Fisher Branch, Glenboro, Grandview, Hamiota, Neepawa, Portage La Prairie, St. Pierre-Jolys, Sanford, Somerset, Souris, Stonewall, Swan River, and Virden.

When Is The Deadline For Applying?

Applications must be completed and returned by April 30, and you cannot insure additional crops after this date. Once you have crop insurance, the contract is *automatically renewed* each year, unless you cancel by March 31.

When Are Crop Insurance Premiums Due?

Premiums are due once you receive a statement of insurance, which is usually in the fall. Starting on September 1, interest is added at the end of each month until the premium is paid.

If My Crop Is Damaged, Can I Still Use The Crop Or The Field?

If a crop is damaged during the growing season, the field must not be tampered with or worked down *until* it has been inspected; it is not enough to leave a strip for the adjustor to inspect. You must contact your local crop insurance agent and have the field inspected before you can use the crop for some other purpose (for example, cut it for feed).

How Soon Must I Make My Crop Insurance Claim?

Where a crop is damaged by hail, you must contact the Canada-Manitoba Crop Insurance Corporation *within three days* so that the damage can be immediately inspected. Crops damaged in other ways during the growing season must be inspected before the crop is cultivated, pastured or destroyed -- and by November 30.

If a crop has been harvested and you feel your production is below average, you must contact your crop insurance agent within 15 days or by November 30 -- whichever comes first. Claims after the November 30 deadline will be subject to penalty fees and may be rejected altogether. No claim will be accepted after March 31 in any crop year.

Is It Possible To Lose My Crop Insurance Coverage?

You can lose your crop insurance coverage if:

- seeding takes place after the final specified date (will depend on your specific crop and farm location);
- an attempt was made to grow a crop from volunteer seed;
- there has been a proven misrepresentation or fraud;
- the crop was destroyed by an avoidable cause;
- fields are worked down before inspection by the Canada-Manitoba Crop Insurance Corporation.

Crop insurance contracts should be read carefully. Some dates and crop eligibilities depend on the location of your farm.

How Can I Get More Information on Crop Insurance?

For complete information regarding specific seeding dates, crop requirements, acreage requirements, insurable crop varieties, etc., ask for a copy of Canada-Manitoba Crop Insurance Corporation's most recent "all-risk" brochure -- available from your nearest Crop Insurance office or from your local agricultural office.

Other Farm Insurance

Livestock can be insured against loss through death, sickness or accident -- through private insurance companies (not Canada-Manitoba Crop Insurance Corporation). Contact the agent from your specific insurance company for more details.

Honey insurance is available from Canada-Manitoba Crop Insurance Corporation for honey producers operating 50 or more colonies. It protects against uncontrollable natural hazards (weather, disease, insects, wildlife) but not against losses due to negligence or poor management (American foulbrood disease, insecticides, herbicides).

Life Insurance

Who Can I Insure?

In general, you can insure anyone in whom you have an "insurable interest" -- that is, where there is a reasonable expectation of money benefit. Some such situations where there is an insurable interest include: child, grandchild, spouse, anyone you are dependent on, and any person in whose life you have a financial interest. Of course, you can also insure yourself, so that people who have an insurable interest in you will be financially protected in the event of your death.

Must I Disclose Everything About My Health?

The Insurance Act of Manitoba says that an applicant for insurance must disclose to the insurer every fact within his/her knowledge that is material to the insurance. The failure to do so will make the contract voidable by the insurer, up to two years from the date the policy takes effect. After two years, a life insurance contract cannot be declared void for this reason.

What Is A Beneficiary?

A beneficiary is the person you name to receive the money (death benefit) from your insurance policy if you die.

Can I Change My Beneficiary On My Life Insurance Policy?

You can name a new beneficiary at any time by notifying your insurance company to have your contract changed. It should be noted that a beneficiary named in an insurance contract comes before a beneficiary named in a will.

What Happens If My Beneficiary Dies?

Usually, if a beneficiary dies before you do, you simply name a new beneficiary in your insurance contract. However, if you are unaware that a beneficiary has died or do not get around to changing the contract, the insurance money will be put back into your personal assets. It is then distributed according to your will (see Chapter 12 on wills).

If there is more than one beneficiary, the deceased beneficiary's share will be divided equally among the remaining beneficiary or beneficiaries.

What Happens If My Beneficiary Dies At The Same Time As I Do?

Unless stated otherwise in a will or in the insurance contract, where the insured person and a beneficiary die at the same time or in circumstances where it is uncertain which of them survived the other, it is presumed that the beneficiary died first. Therefore, your insurance money will be put back into your personal assets.

How Long Does My Beneficiary Have To Make A Claim?

Any claim under a life insurance contract must be made *within one year* after the proof of claim (death certificate) is furnished, or within six years after the death -- whichever comes first.

What Happens If I Commit Suicide?

Unless your insurance contract specifically states otherwise, you *may not* be insured if you commit suicide.

Disability Insurance

What Is Disability Insurance?

Disability insurance, also called "accident and sickness insurance," provides income when a person is disabled and unable to earn revenue. If sickness or accident keeps you from your farm work, the farm business will continue to need attention, living expenses will continue, and extra medical expenses may be added to your monthly cash outflow. You can see why it's a good idea to insure your ability to earn income.

Where Can I Get Disability Insurance?

This type of insurance can be purchased separately, or as an option on some life insurance policies. Professional associations, trade associations, farm groups and similar organizations might offer this type of insurance to their members. In addition, some banks and financial agencies may include life insurance and disability insurance over the life of a farm loan or mortgage you have with them.

What If I Have Off-Farm Employment?

Some employers provide employees with a specified number of *paid* days off from work due to accident or any form of illness. Unused sick days accumulate and can normally be used when required. As well, a group disability plan might be available through your employer.

What About Workers Compensation?

Self-employed people, such as farmers, are not covered under workers compensation.

Workers Compensation pays benefits to employees, based on earnings, for job-related accidents and sickness. If you are a farm employee, you may or may not be covered because this program is voluntary for farm businesses. Benefits received under this program are income-tax free.

Does Canada Pension Plan Pay Disability Benefits?

Benefits for long-term disabilities are available for totally and permanently disabled persons. However, the eligibility qualifications are strict and benefits are taxable.

Can I Receive Disability Benefits Under Unemployment Insurance?

Farmers and farm workers who work only on their own land are self-employed and do not pay unemployment insurance premiums. Therefore, they are not entitled to collect unemployment insurance benefits.

However, if you work part time in agriculture and full time elsewhere, you may be able to get unemployment insurance benefits through your employer. Short-term disability benefits are available from 14 days after you are disabled, and continue for up to 15 weeks. These benefits are taxable. You could also qualify for illness, maternity, adoption, or special (age 65) benefits. Ask about your unemployment rights at any Canada Employment Centre, or pick up one of their free brochures.

Motor-Vehicle Insurance

What Is Vehicle Insurance?

In Manitoba, all motor vehicles (cars, trucks, off-road vehicles, etc.) must be registered and insured with Autopac, an insurance system set up by the provincial government. You will get a licence plate that you must display on the back of your vehicle, and a registration card that says that your vehicle has been insured by Autopac. If you cause an accident, you will have to pay part of the costs of the damages (the deductible), and Autopac will pay for the rest. With basic insurance, your deductible is fairly costly, but if you buy additional insurance, you can lower your deductible.

Under Autopac, What Is The Definition Of A Farmer?

Autopac defines a farmer as a person, corporation, or group of persons who own, rent or lease land for the purpose of one or more of the following operations:

- growing crops or fodder;
- raising livestock or poultry;
- egg production;
- honey production;
- raising mink or fox;
- milk or cream production;
- operating a feed lot on which cattle are kept.

These operations must be for the purpose of selling or marketing a product, and must be carried out for at least three months or 720 hours per year.

When Is A Vehicle Considered A Farm Passenger Car?

A farm passenger car is defined as a passenger vehicle owned by a person who *lives* on a farm in Manitoba, and whose primary occupation (in terms of time spent, not monetary return) is farming *or* who is retired from farming.

There are two categories of insurance for farm passenger cars. Under the first, which is for farm use only, a farm car cannot be driven to or from (or part way to or from) work or school for more than 1,609 kilometres (1,000 miles) a year, or more than four days a month. Under the second type, which is for all uses, a farm car can be driven to or from work or school, or used for business purposes. The second type of insurance is naturally more expensive.

When Is A Vehicle Considered A Farm Truck?

A truck owned or leased by a farmer (even if the farmer does not live on the farm) is considered to be a farm truck, and is eligible for a "farm truck" insurance rating. Retired farmers, farm employees, and people who own land leased out for farm purposes are not eligible for the farm truck insurance rating.

Do I Need To License My Trailer?

A farm trailer does not require licence plates so long as it is being towed by a tractor. However, a trailer towed by a licensed car or truck does *not* qualify as a farm trailer, and therefore is required to have licence plates and insurance.

A farm trailer is defined as a trailer owned by a farmer that is being used in:

- transporting and marketing of produce (including livestock) from a farm that belongs to either the owner of the trailer or the owner of the farm tractor that is pulling it.
- transporting of property for use on the farm belonging to either the owner of the trailer or the tractor that is pulling it.

Do I Need To Register and Insure My Tractor?

You need to register and insure your tractor when it becomes a "motor vehicle" -- that is, a vehicle that is driven on a highway for any purpose other than for towing farm implements; for towing other vehicles used for transporting farm produce, livestock or other farm property; for moving it during farm operations; for having it repaired.

In other words, if you are using your tractor on the farm for general farm use, you do not need to license and insure it. It is considered a farm implement and does not require registration.

What is Basic Autopac Coverage?

Basic coverage includes:

- all-perils vehicle coverage;
- third-party liability insurance;
- under-insured motorist coverage;
- comprehensive accident benefit program.

What is "All-Perils" Coverage?

This part of the basic Autopac program covers an insured vehicle and its permanently-attached equipment for accidental loss or damage.

What is "Third Party Liability Insurance"?

With some restrictions, Autopac's third party liability insurance protects you (up to a maximum) for claims against you resulting from an accident occurring within Canada or the United States, where your vehicle injures another individual or damages another person's property. It also protects Manitoba drivers who unknowingly operate an uninsured vehicle, or who operate a vehicle registered elsewhere in Canada or in the United States.

Do I Need More Than Basic Autopac Coverage?

In most situations, you do not need more than the basic Autopac coverage. However, it depends on your financial position, the item being insured, and the risk involved.

Because the maximum insured value for some vehicles (such as trucks, truck-tractors, farm trucks, motor homes, trailers, and buses) is only $15,000 under basic Autopac insurance, you should consider purchasing excess value coverage (for vehicles valued at more than $15,000) through the Special Risk Extension Program.

Some other areas of optional extended coverage include:

- increased coverage for permanently-installed sound and electronic communications equipment (radios, CB radios, ham radios, tape decks);
- coverage for unregistered vehicles that are in storage;
- commercial vehicle insurance;
- loss-of-use coverage to cover expenses for alternate transportation.

How Long Do I Have To Make An Autopac Claim?

You must report all accidents within seven days. If it becomes necessary to sue the other party, you must begin the lawsuit within two years of the occurrence of the accident or damage.

Is There Any Situation When Autopac Coverage Becomes Invalid?

Yes, there are several situations that could result in no coverage, and therefore, no payment on your claim:

- if your vehicle or your residence are improperly stated (using rural registration and rates with a urban residence, or using a farm car for regular use to/from school/work);
- if you fail to make payment by the appropriate due date (NSF cheque, no payment reminder, or postal problems are not considered excuses);
- if you fail to pay the additional premiums that result from changes in residence or car use;

- if you fail to notify Autopac within 15 days of any changes to your name or address;
- if you improperly transfer your plates.

Can I Drive A New Or Replaced Vehicle With The Old Plates?

It depends on the type of vehicle.

If you replace your present vehicle with another in the same registration class as the one you are selling or discarding, then you *can* transfer the plates to the new vehicle. However, you must *register the transfer within seven days* of giving up legal ownership of the original vehicle.

If you replace your present vehicle with another in a different registration class (car to a truck), then the existing plate *cannot* be transferred to the new vehicle. You must apply for a new plate, and you will be given a credit from your previous registration/insurance coverage toward the new one.

If you purchase another vehicle and keep your present one, the licence plate *cannot* be transferred to the new vehicle without *first reporting* the details of the change in person to any Autopac outlet.

What If I Don't Tell The Truth On My Autopac Application?

The Manitoba Public Insurance Corporation Act says that you must correctly describe the vehicle to be insured, not knowingly misstate a fact in the application, comply with the terms of your insurance contract, and not intentionally make any false statements if you are making a claim. Otherwise, your coverage may be lost.

If you are involved in an accident that causes damage to the property of others, or causes injury to someone else, you must promptly notify Autopac and give all available information. As well, you are required to promptly notify Autopac in writing of any change within your knowledge that might affect your vehicle insurance contract.

If I Have Valid Insurance From Another Province Or Another Country And Move To Manitoba, Am I Covered?

If you have a valid out-of-province or out-of-country insurance, it will cover your motor vehicle for a *period of three months*. After this time, you must get insurance from a Manitoba Autopac agent or the Motor Vehicle Branch.

Do I Need To Carry My Vehicle Registration At All Times?

It is recommended that you always have your vehicle registration/insurance card with you. It is proof of insurance that all motorists must have, and it is accepted throughout North America. Your vehicle could be seized if you cannot produce a registration card, regardless of whether your vehicle was involved in an accident.

Off-Road Vehicles

What Is An Off-Road Vehicle?

An "off-road vehicle" refers to any wheeled or tracked motor vehicle made for cross-country travel. It includes all-terrain vehicles, mini-bikes, dirt bikes, trail bikes, dune buggies, and snowmobiles. It does *not* include farm implements (tractors, combines, etc.).

Do I Need To Register And Insure My Off-Road Vehicle?

You *do not* need to register or insure your off-road vehicle if it is operated *only* on your own property, or if it is a competition vehicle operated only on a competition circuit. All other off-road vehicles must be registered and insured. Upon registration, you will be issued a registration plate and certificate, which must be carried with the off-road vehicle operator.

Can I Transfer The Plates Between My Off-Road Vehicles?

The only time you can transfer plates to another off-road vehicle is if you sell or give away one vehicle and immediately acquire a new one. If this is the case, the old registration will continue to be valid for seven days. The registration automatically expires at the end of the seven days -- unless you have paid a transfer fee.

In all other situations, whenever you transfer ownership of an off-road vehicle to a new owner, the registration automatically expires. Registration (and insurance) also automatically end if you remove the plates from one off-road vehicle (a trail bike) and put them onto a different vehicle (a snowmobile).

Do I Have To Wear A Helmet On An Off-Road Vehicle?

Operators and passengers of off-road vehicles *must* wear properly fastened safety helmets -- unless the vehicle is equipped with occupant roll-over protection, and the occupants are wearing seat belts. Occupant roll-over protection means a cab or frame that is capable of supporting the vehicle in an overturned position.

Farmers are exempt from the mandatory helmet requirement while they are engaged in farming operations.

Can My Children Use Off-Road Vehicles Without Supervision?

No one under the age of 14 is permitted to operate an off-road vehicle -- unless accompanied, supervised, and at all times, within clear view of a parent, or person who is at least 18 years old and authorized by the parent.

Where Can't I Drive My Off-Road Vehicle?

An off-road vehicle cannot be used:

- on the road;
- on someone else's property without their permission;
- on Crown (provincial) land without permission;
- within 30 meters of someone else's home, between midnight and 7:00 a.m.;
- within 30 meters of an unenclosed playground or other recreation area.

What Are The Penalties For Careless Operation Of An Off-Road Vehicle?

Anyone who operates an off-road vehicle without due care and consideration for other people or property can be charged with careless operation. Both the owner and the operator of the vehicle may be held responsible for violations of the Off-Road Vehicles Act. Anyone found guilty of offenses under the Act is subject to fines ranging up to a maximum of $1,000, or a jail term of up to one year.

Sources Of Information

Ask for the following publications:

- **Farm Insurance Factsheets**
  - Risk and Insurance
  - Property Insurance Overview
  - Dwelling and Contents
  - Farm Buildings
  - Equipment and Inventories
  - Livestock and Poultry
  - Liability Insurance
  - Personal Disability

- **A Guide to Life Insurance for Manitoba Farmers**

  Available from:
  Publications Distribution Centre
  Manitoba Agriculture
  Room 805 - 401 York Avenue
  Winnipeg, Manitoba
  R3C 0P8 or phone 945-3846

  or your local agricultural office

- **All Risk Crop Insurance**
- **Livestock Feed Security Program**
- **Honey Insurance Program**
- **Hail Rates**

  Available from:
  Canada-Manitoba Crop Insurance
  (Your Local Office)

- **Information for Residents**
- **Pharmacare**

  Available from:
  Manitoba Health Services
  Box 925 - 599 Empress Street
  Winnipeg, Manitoba
  R3C 2T6

- **Plus Plan**
- **Extended Health Benefits**

Available from:
Manitoba Blue Cross
100A Polo Park Center
P.O. Box 1046
Winnipeg, Manitoba
R3C 2X7

- **What you need to know about U.I.**
- **We can help when you're sick or hurt.**
- **A new face in the family photo.**
- **U.I. and you: when you reach 65**

Available from:
Employment & Immigration
Your Local Office

- **Autopac Policy Guide**
- **Time Payment Plan**
- **Coverage For Older Vehicles**
- **Optional Autopac Coverage**
- **Driver's Licence Premiums**
- **Autopac Merit Discounts**
- **Coverage For Motorcycles**
- **The Off-Road Vehicles Act**

Available from:
Manitoba Public Insurance Corpration
Customer Services
Box 630
9th Floor, 330 Graham Ave.
Winnipeg, Manitoba
R3C 4A4

Chapter 3
Business Organization Law

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Business Organization Law

Which Type of Business Arrangement Is For You?

The form of business organization that best suits your business will depend upon the individual facts of your operation. This chapter is not intended to provide you with knowledge of the relevant law so that you can make the final decision on your own. Instead, it is to help prepare you for discussions about your situation with your advisors, so you can make a more informed decision on the appropriate business organization for your farm. Your final decision should come only after consulting the appropriate professional -- your lawyer, accountant, farm management specialist, or some similarly-trained person.

Sole Proprietorship

What Is A Sole Proprietorship?

A sole proprietorship is the simplest and most common business organization. This type of business is owned by only one person who has all the legal rights and responsibilities associated with it. The income and expenses of this business are included in the owner's personal tax return.

What Are The Advantages Of Sole Proprietorship?

This type of business organization is the easiest and least expensive to form, organize and end. No special legislation governs this area in Manitoba, and a sole proprietor can do anything an individual can do. Also, a sole proprietor has absolute control over management decisions.

If you are a sole proprietor, you won't have to register the business name if you use the family name -- for example "Jones Farming." But, if you use a name other than the family name -- for example "Big Valley Farming" -- or if the business name indicates that more than one person is involved in the business (Jones and Company), then the name must be registered under the Business Names Registration Act.

In a sole proprietorship, accounting procedures are straight-forward, and the tax implications are less complicated than for partnerships or corporations. Unlike an employee, a sole proprietor can deduct business expenses from income. Also, business losses can be used to offset other personal income, which can't be done with a corporation. Exceptions to this occur for part-time farmers and hobby farmers. Part-time farmers can deduct up to $8,750 of farm cash losses from other income, but hobby farmers cannot deduct any farm cash losses from other income.

What Are The Disadvantages Of Sole Proprietorship?

Because a sole proprietorship is not a separate legal entity, the owner can be held personally liable for all debts of the business, or for negligent acts of employees in the course of their employment. Personal assets can be seized for the non-payment of debts.

Upon the owner's death, the business comes to an end. Business property may be transferred to another person upon death, but the new proprietor is a new business entity. Because the old business ends, the resulting taxes payable may be so substantial that some assets may have to be sold to meet these obligations.

In a sole proprietorship, one person acting alone may be limited in the amount of capital that can be raised. Your ability to borrow money will partly depend on the value of the personal assets that you can use for collateral.

As a sole proprietor, you need not take orders from anyone when managing your business. However, you will not gain from the management expertise of others in the business.

Partnership

What Is A Partnership?

A partnership is defined as a relationship that meets the following requirements:

- two or more persons are involved;
- they are carrying on a business in common;
- they are attempting to make a profit.

Each partner must act not only for his/her own benefit, but also for the benefit of all the other partners.

It should be noted that the receipt of a share of profits alone does not make a person a partner in business. Where the parties are only co-owners and have established this relationship in order to maximize their individual profit, a partnership need not exist.

How Is A Partnership Created?

A partnership can come into existence either through a written or oral agreement, or by implication from the conduct of the parties. It is based on a contractual relationship. A minor (someone under 18) can be a partner but, he/she is not liable for debts. However, a minor *can legally bind* the partnership to a contract.

It is strongly recommended by most professionals that a written partnership agreement be drawn up, as this will aid in the settlement of any future disputes. The purpose of this agreement is to set out the rights and responsibilities of the partners, the capital to be contributed by each partner, the division of profits and losses, the time that each partner will devote to the business, provisions for the termination of the partnership, provisions for the retirement or death of partners, and provisions for the liability of the partners to each other.

The partnership agreement should include several areas:

- name of the partnership, full identity and type of partners;
- scope of the partnership business (description);
- date when the partnership will begin and terminate (if applicable);
- contribution of assets and entitlement to assets upon dissolution (if no provision is made, the capital will be divided evenly between the partners on dissolution);
- banking arrangements -- where, how, and who will sign the cheques (in absence of an agreement to the contrary, all partners have equal power);

- method of dividing profits and losses (in the absence of an agreement to the contrary, they will be divided equally), and when they will be divided (annually, biannually, etc.);
- ability of partners to take drawings in advance of the division of profits (salaries);
- decision-making process -- how and who makes decisions;
- introduction of new partners and the retirement of old partners;
- method and system of accounting;
- course of action if a partner dies or goes bankrupt;
- how the partnership can be dissolved;
- description of partnership property, and property owned by the individual partners;
- restrictions that limit the commercial activities of the partners or a former partner outside the partnership;
- contribution of amount and type of labour to the partnership, as well as what to do if a partner is unable to perform his/her functions;
- arbitration process in case a dispute arises.

How Is A Partnership Dissolved?

Where no fixed term has been agreed upon for the duration of the partnership, any partner can bring the partnership to an end by giving notice to all of the other partners of her intention to dissolve the partnership. It can also be dissolved by agreement between the partners.

Unless otherwise agreed, a partnership is dissolved by the death, bankruptcy, or insolvency of any partner. It can be dissolved at the end of a fixed term, or, if entered into for a single undertaking, upon the termination of that undertaking.

If any partner allows his share of the partnership to be used as security for his/her personal debts, the other partners can choose to end the partnership.

A partner can also apply to a court to have the partnership dissolved if:

- one of the partners is of permanently unsound mind;
- one of the partners becomes permanently incapable of performing her part of the partnership contract;
- one of the partners has been guilty of misconduct;
- one of the partners wilfully or persistently commits a breach of the partnership agreement;
- the partnership has no potential for profit;
- he believes that it would be just and equitable to do so.

What Are The Rights And Obligations Of A Partnership?

The Partnership Act sets out the rights and duties of the partners, but these can be varied by the partnership agreement. However, when there is no partnership agreement, or if specific rights and obligations are not covered in the agreement, the partnership will be forced to follow the act.

Because partners are given broad powers to bind the partnership, and thus the other partners, a partner has "fiduciary duty" to the other partners. This means that each partner has a duty to look out for the best interests of the partnership, by acting with honesty and in good faith within the partnership.

- **Rights:**

Unless otherwise specified in the partnership agreement, the Partnership Act says that a partner has the right to:

- legally bind (hold) the other partners to contracts made in the name of the business;
- share equally in the capital and profits;
- take part in managing the partnership;
- make business decisions on behalf of the partnership. (For major decisions -- for example, changing from crops to livestock -- or for those requiring large sums of money, it should be written into the agreement that the unanimous consent of each partner is required.)

- **Obligations:**

A partner has certain obligations under the Partnership Act. He/she:

- is liable for contracts and debts entered into by other partners;
- is liable for wrongful acts done to others by other partners acting on behalf of the partnership;
- has a fiduciary (trust) relationship with the other partners;
- cannot carry on a business that competes with the partnership without the consent of the other partners;
- must contribute equally to any losses.

What Are The Advantages Of A Partnership?

A partnership is simpler and less expensive to form and dissolve than a corporation. As well, it allows for the pooling of talent and capital not available in a sole proprietorship.

For income tax filing, each partner claims his/her share of net partnership income and is taxed at his/her personal rate. Another tax advantage occurs when you

transfer an interest in the family farm partnership, because it is eligible for the family farm rollover provision and the $500,000 capital gains exemption (which could provide tax savings).

What Are The Disadvantages Of A Partnership?

A partner is personally liable for all of the debts, obligations, and wrongful acts of the other partners occurring in the course of the business. As a result, the personal assets of the partners can be seized to pay any liabilities.

Another disadvantage is that, unless the partnership agreement states otherwise, the partnership must be ended and reconstituted whenever a partner leaves or a new partner is added. The cost of "buying out" a departing partner may, if not properly structured, put a tremendous financial strain on the firm.

Accounting records could be another disadvantage; they could be more complex when compared to a sole proprietorship. As well, management decisions can be more difficult to make.

Is It Possible For A Partner To Limit His/Her Liability?

Most partnerships are called "general" partnerships. However, the Partnership Act also provides for a second type, known as "limited partnership." In a limited partnership, there must be at least *one general partner* and *one limited partner*. Limited partners cannot participate in management, and are not liable for the debts of a limited partnership beyond the amount of capital that they have contributed. If they do participate in the management of the partnership, they are no longer limited partners and lose their limited liability status.

Under the act, only general partners are authorized to enter into contracts that legally bind the partnership. However, a limited partner can become a general partner if he/she takes part in the management of the partnership business with the knowledge of the general partner. Similarly, if the limited partner deals on behalf of the partnership with any person who does not know they are a limited partner, he/she becomes a general partner. He/she is then able to enter into contracts that legally bind the partnership, and becomes personally liable for all of the partnership debts.

Limited partnerships are seldom used because of the regulations concerning non-involvement in the management of the business. They must be registered under the Business Names Registration Act to enable limited liability for the limited partner(s).

Joint Ventures

What Is A Joint Venture?

A joint venture is very similar to a partnership. It combines the skills and resources of two or more people or businesses for a specific purpose or period of time. For example, two farmers might agree to jointly rent a piece of land and farm it together for one season.

There are no laws in Manitoba that are specifically designed to regulate joint ventures, but many people in the legal profession believe that the provisions of the Partnership Act apply to joint ventures. Because of this uncertainty, it is important to agree in writing on the guidelines of your joint venture. Some areas that should be discussed in any joint venture agreement are management, dissolution, membership changes, and the selling of one person's interest.

What Are The Advantages Of A Joint Venture?

A joint venture has greater access to financing than a sole proprietorship because it combines two or more peoples' ability to raise capital.

An advantage of a joint venture over a partnership is that the fiduciary relationship is limited. In other words, a joint venturer may *not* have to put the best interests of the joint venture above all other interests.

In a joint venture, there is no "agency relationship." This means that a joint venturer cannot be held to a contract she did not agree to sign, unless the joint venture agreement says she will be. Also, each joint venturer will only be responsible for expenses he incurs.

There is also a tax advantage because each joint venturer claims an individual amount of capital cost allowance (unlike a partnership where the amount is fixed by the agreement).

What Are The Disadvantages Of A Joint Venture?

The decision-making process for a joint venture is more complicated than sole proprietorship or a partnership, and usually requires unanimous agreement.

A major disadvantage is, because of the unclear status of joint ventures in Manitoba, there is a danger that Revenue Canada may classify your arrangement as a partnership, forcing you to divide the net profits rather than the gross returns. While dividing net profits may cause a joint venture to be viewed as a partnership, dividing the gross returns may cause problems for friend/family joint

ventures because it allows the possibility of the venture being a success for one person and a failure for another.

Another disadvantage is that it is unclear at this time whether death of one of the joint venturers dissolves a joint venture. This can pose all sorts of complications and possible court procedures.

Corporations

What Is A Corporation?

Corporations are a highly-structured form of business organization. A corporation (or company) does not simply mean that the group of shareholders are using a different name. Rather, it is a "legal" person with rights and duties under the law, and will not cease to exist when its shareholders die. A corporation can own property, sue and be sued, and it must file its own income tax return.

The following example illustrates the separate entity concept:

> *John is a farmer who creates a corporation called Jones Poultry Farms. Later, John takes two chickens from the barn to make supper. Unless the corporation has authorized this, John could be charged with theft because he and his corporation are separate, and the birds belong to the corporation -- not to John. As a shareholder of the corporation, John is entitled to a share of the profits, but he cannot use or destroy corporate assets while the corporation is still in business.*

On rare occasions, a court will "pierce the corporate veil" by disregarding the principle of separate entity in order to look at the reality of a situation. It might then hold shareholders responsible for the actions of the corporation. However, these occasions are limited to cases where the corporation is being sued for committing an injustice (fraud, tax evasion etc.).

There are three main groups of people involved in any corporation:

- The **shareholders** own the corporation, and each receives a portion of company profit based on the number and type of shares they own. A shareholder's liability is limited to the price he paid for the share. Thus, if a corporation loses money on a bad deal or is sued and about to go bankrupt, it can't demand money from the shareholders to prevent this, unless the shareholders have given personal guarantees.
- A **board of directors** is elected by the shareholders, and it is responsible for the management of the corporation. Directors must act honestly and in good faith, with the best interest of the corporation in mind, and must disclose any personal interest in any contract the corporation enters.
- **Officers** are hired by the directors, and they are responsible for the corporation's day-to-day operation. Unlike shareholders, the officers can legally bind the corporation to contracts they sign on its behalf.

Are All Corporate Shareholders The Same?

Two classes of shares are often used in farm corporations -- **preferred shares** and **common shares**:

- **Preferred shareholders** have priority when dividends are paid, and for return of capital when the corporation is dissolved. But preferred shareholders do not share in any surplus value when a corporation's assets are sold and the debts paid. Generally, they have no voting rights. Preferred shareholders enjoy a more protected position, but their shares generally do not increase in value as the corporation prospers.
- **Common shareholders** have rights to any surplus value if the corporation is dissolved. Generally, they carry voting rights, but are not in a priority position for payment of dividends or return of capital. Common shares generally increase in value if the corporation prospers, and decrease in value if it falters.

However, the above are only examples. The allocation of rights to share classes is flexible to allow the needs of a corporation to be met, and you can allocate your rights in the way that's best suited to your corporation. For instance, in a parent-child corporation where the parent wants to maintain control, the parent could be issued the only shares with voting rights.

What If I Make A Corporation Contract Before I Incorporate?

A pre-corporation contract is one that is entered into on behalf of and for the benefit of a corporation before it comes into existence. In Manitoba, a person who enters into a written pre-corporation contract is personally bound and liable under the contract -- unless the contract states that the person has entered into it on behalf of the future corporation, and those involved with the corporation agree to this. Personal liability ends when the corporation adopts the contract -- unless the contract specifically states that the person is to remain liable, or a court holds the person liable.

Should I Incorporate Federally or Provincially?

In Canada, a company can be incorporated *either* federally or provincially. If your business will be operating primarily within Manitoba, you should incorporate provincially because the procedure is simpler and less expensive. If your business will be operating throughout Canada, then it may be better to incorporate federally. The actual paperwork should be done by a lawyer, but do-it-yourself books are available.

What Are The Advantages Of A Corporation?

A corporation provides limited liability for the shareholders because it is responsible for its own debts and obligations. However, this advantage is often lost because many financial institutions and suppliers will not provide credit to a corporation unless they receive a personal guarantee from the shareholders. In Manitoba, a director may also be liable for up to six months of employee wages, and for dividends, when the corporation cannot pay them.

Another advantage is that a farmer in a high personal income tax bracket can gain income tax savings with a lower corporate tax rate. However, with recent tax reforms, these savings have been reduced.

A corporation provides flexibility in the organization, and in relationship between the owners. It does not end upon the death of one of its shareholders or directors, and control and ownership are easily transferred simply by selling shares. Because shares of a farm corporation qualify under rollover and capital gains exemption rules, a corporation may also be a suitable method of transferring control and ownership of the business from the parent to the children. (See Chapter 11 on estate planning.)

Another corporate advantage is that it may be easier to raise additional capital by selling additional shares. However, in Manitoba, a private corporation is limited to 50 shareholders who are relatives and close business associates. Unlike a public corporation, a private corporation cannot offer its shares for sale to the general public or trade them on a stock exchange.

What Are The Disadvantages Of A Corporation?

The cost of incorporating a business and maintaining the corporation can be high. As well, the laws governing corporations are more complex. Because a corporation is a separate *entity*, it must file its own complex income tax return -- and the shareholders must file separate personal income tax returns. A corporation must also make monthly payments toward its estimated annual tax.

Unlike a sole proprietor, a farm corporation cannot average income. As well, shareholders cannot use corporate losses to offset other personal income.

Co-operatives

What Is A Co-operative?

A co-operative is similar to a corporation and is governed by similar laws. It is a separate legal entity distinct from its members, and the liability of members is limited to the purchase price of their shares.

The members are the owners of the co-operative but, unlike the shareholders of a corporation, each member is entitled to only one vote no matter how many shares he/she owns.

As in a corporation, a co-operative requires directors to manage it. These directors are elected by the members of the co-operative and must be members themselves. The directors of a co-operative must act honestly and in good faith, and must disclose any interest in contracts entered into on behalf of the co-operative. Co-operative directors are required to call an annual meeting at least every 15 months.

A co-operative is run for the benefit of its members. Its goal is usually to provide inexpensive goods or services for its members, rather than to make a profit.

Is A Co-operative Incorporated?

A co-operative must be incorporated, and this can be done either federally or provincially. Unlike the Corporations Act, the Co-operative Act that governs co-operatives allows a provincial registrar to exercise control over the incorporation of co-operatives. Before the registrar gives approval, he/she must be satisfied that incorporation is advisable.

What Are The Advantages Of A Co-operative?

Co-operatives have many of the same advantages as corporations -- limited liability, the ability to raise money by selling shares, and continuing on after the death of a member. An added feature of a co-operative is the "one member/one vote" concept.

A special income tax advantage of co-operatives is that profits distributed to members as patronage dividends are not taxable to the co-operative. Patronage dividends are based on the amount of business each member does with the co-operative.

What Are The Disadvantages Of A Co-operative?

The laws governing co-operatives are somewhat complex. A co-operative is *not* the most appropriate form of business organization if the goal is profit maximization.

Co-Tenancy Of Property

What Is Co-Tenancy?

It is called co-tenancy when two or more people share ownership of undivided portions of farm and/or some other type of property. They do not own particular sections of the land or certain pieces of machinery; they own a shared interest in the entire property. Co-tenancy can be created through an agreement, or just by changing the names of the owners on the title document.

What Are The Rights And Duties Of Co-Tenancy?

Because there is no fiduciary (trust) relationship among co-tenants, a co-tenant does not have to act in the best interests of the other co-tenants.

Each co-tenant has the right to possess and use all of the property but not to the extent that it excludes other co-tenants without their agreement.

During the co-tenancy, a co-tenant cannot force the other co-tenants to pay their share of repairs and improvements -- unless the repairs were done to pay an obligation of all the members, or the other co-tenants requested the repairs. Money spent can be recovered at the end of the co-tenancy.

A co-tenant can ask a court for the property to be divided -- either through a partition or through a sale. **Partition** means that the property is physically divided into separate pieces according to the various ownership proportions. If the property is **sold**, each co-tenant receives a share of the proceeds instead. A sale is usually ordered in cases where the property cannot be easily divided (machinery). A court rarely refuses to grant partition and/or sale unless the person applying does not deserve it due to bad behaviour. It will try to ensure that a co-tenant who received more than his/her share during the co-tenancy receives a smaller amount from the partition and/or sale.

Is There More Than One Kind Of Co-Tenancy?

There are primarily two types of co-tenancy -- **tenancy-in-common** and **joint tenancy**.

What Is Tenancy-In-Common?

Tenancy-in-common is a widely-used type of co-ownership. In it, co-tenants own the property in undivided proportions, which can be unequal in size. Tenants-in-common all have a right to possession -- even if their shares in the property were received at different times and on separate documents (for example, one as a gift and one in a will).

A tenant-in-common can transfer her share to another person without ending the tenancy-in-common. Because of this the property can be passed on to her heirs.

Because tenancy-in-common shares need not be of equal size, a parent can leave the farm to his children in unequal shares, reflecting each child's contributions to the farm. As well, a tax rollover is possible if the land was farmed by the child prior to property transfer. (see Chapter 11). However, there is a charge for transferring a land title from a tenant-in-common to another person.

What is Joint Tenancy?

In joint tenancy, co-tenants have an *equal* claim to use and enjoy the land, but cannot usually leave their share to their heirs. There is an automatic "right of survivorship" between joint tenants, which means that surviving joint tenants receive the deceased joint tenant's share.

Because of right of survivorship, joint tenancy allows the entire property to remain in one piece, and the last surviving joint tenant will receive the whole property.

In a joint tenancy, the cost of transferring land through the Land Titles Office is reduced because the title passes automatically upon the death of one of the joint tenants.

Right of survivorship takes precedence over any will a joint tenant may leave, and for this reason, joint tenancy is primarily used in family situations. Right of survivorship also creates uncertainty because an older joint tenant may unexpectedly outlive a younger joint tenant, and thus thwart the intention of the joint tenancy's creator.

Joint tenants can easily convert their relationship into a tenancy-in-common by either:

- agreeing to become tenants in common instead;
- indicating through their behaviour that they consider the joint tenancy to be severed (for example, selling the land and splitting the proceeds);
- one of the joint tenants treating the land as a tenancy-in-common by selling his/her share;
- asking the court for a severance. In this case, the other co-tenants would still hold their land in joint tenancy.

Sources Of Information:

Ask for the following publications:

- **Farm Business Arrangements**
- **Farm Corporations**
- **A Process for Choosing a Form of Business Organization (factsheet)**
- **Articles of Incorporation (factsheet)**
- **Forms of Business Organization: A Comparison (factsheet)**

Available from:

Publications Distribution Centre
Manitoba Agriculture
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or your local agricultural office

Chapter 4
Land Law

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Land Law

What Is "Land"?

"Land" has a much wider meaning in law than it does in everyday conversation. When you agree to buy or sell a piece of land, this includes the **soil** or **land** itself -- as well as any **buildings, fixtures, crops,** and **minerals.**

A **fixture** is anything attached to the land or to a building on the land. Permanent fences, plumbing, light fixtures, wall-to-wall carpets, and buildings on foundations are all fixtures. When the land is sold, the law presumes that the fixtures are included in the sale, unless the buyer and seller agree otherwise. Because it can be difficult to distinguish fixtures, you should always specify in the sales agreement which items are to be included and excluded from the land sale.

A **crop** will *not* automatically be included in a land sale if it:

- is swathed at the time of the sale;
- is an annual crop even if it is still standing (wheat, flax, barley, oats, canola, etc.);
- is a perennial crop and is ready for harvest at the time of the sale. (fruit, hay, etc.)

Most **mineral rights** in Manitoba are owned by the government. However, if a landowner owns the mineral rights, a sales agreement should clearly identify whether the mineral rights are included in the sale.

Most major **bodies of water** are also owned by the provincial government -- including rivers, streams, lakes, creeks, and other permanent bodies of water. Non-permanent bodies of water -- like sloughs or swamps -- are the property of the landowner and are included in the land sale.

Ways Of Owning Land

What Do I Need To Know?

There are two legal issues in the ownership of land:

- **"interest" in the land** -- how long you are entitled to use and possess it;
- **form of ownership.**

What Is An "Interest" In Land?

An interest in land can be held by way of a **fee simple estate**, a **life estate** or a **leasehold estate**. These interests differ in the length of possession for the owner.

- **Fee Simple**

If you own land in fee simple, you own it for the present and the future -- and you are free to do anything with it that the law allows. You can sell or give the land away, and you can alter it -- through mining, landscaping or cutting timber on it. No one can interfere with your use or possession of the land unless they have been given special rights to it, unless they are enforcing the law, or the government requires it (expropriation). An owner of a fee simple interest in land is registered as the owner on the Certificate of Title. (Most of the land in Canada is owned in fee simple.)

- **Life Estate**

A life estate is created when a fee simple owner transfers land to one person for a specified term and then to another person when that term is over. This specified term, called a life estate, may be for the duration of the life of the first person. At the conclusion of this term, a second person, the "remainderman," receives the entire fee simple interest.

If you want to leave your land to the children, but also want to insure that your spouse will be provided for during his/her lifetime, you could leave your spouse a life estate in your will, with the remainderman interest going to the children. In this way, your spouse keeps the property until death, and then your children become complete owners (fee simple interest) of the land.

Unlike a fee simple owner, a life estate owner cannot do anything he/she wants to the land. He/she cannot make any permanent changes, such as demolishing buildings or cutting timber on it, without the remainderman's permission.

Life estates are created through wills or by the Dower Act. The latter gives the surviving spouse of the deceased a right to the family home for the rest of his/her life, no matter what is said in a will. (The Dower Act is discussed in greater detail in Chapter 11)

- **Leasehold Estate**

A leasehold estate is an interest in land that lasts for a specific known period of time. The person renting the land has the right to use the land for the specified period, but eventually these rights will revert to the holder of the fee simple. (Leasing will be discussed in greater detail later on in this chapter.)

What Forms Of Ownership Are There?

There are three forms of ownership: **sole ownership, joint tenancy**, and **tenancy-in-common.**

- **Sole Ownership**

If you are the sole owner of a piece of property, your name will be the only name on the Certificate of Title. You have complete control over the land, with one exception -- the Dower Act may prevent you from making any transactions on your "homestead" [the place where you and your spouse live, and the adjacent land up to 129.5 hectares (320 acres)] without your spouse's written consent.

- **Joint Tenancy**

Joint tenancy is one of the ways that two or more persons can own an estate in land at the same time. The only way to create a joint tenancy in land is by registering title "as joint tenants" in the appropriate land titles office. Joint tenants must all become co-owners at the same time and own equal shares. As well, each person is entitled to use and enjoy the entire property.

The right of survivorship is the most important feature of joint tenancy. If one of the owners dies, ownership of the property automatically goes to the surviving owners (and not to the heirs of the deceased owner). For this reason, joint tenancies are generally limited to situations where the property is owned by closely-related people such as husbands and wives.

A joint tenancy will be ended if the joint tenants agree to become tenants-in-common instead (see below.) Also, if one of the tenants does something inconsistent with a joint tenancy -- such as selling the joint tenancy interest -- this tenant would automatically hold the property as a tenant-in-common.

- **Tenancy-in-Common**

Tenancy-in-common is another way that two or more people hold land as co-owners. Similar to a joint tenancy, a tenancy-in-common gives each tenant the right to use and enjoy the entire property. However, tenants-in-common may own unequal shares, and they don't have to acquire the land at the same time as other co-tenants. As well, there is no right of survivorship. If one of the owners dies, the property does not automatically go to the other owners. Also, each owner is free to sell his/her share at any time.

The law presumes that all co-ownerships of land are tenancies-in-common, unless the co-owners specifically document that they are joint tenants.

(Co-ownership of land is discussed in greater detail in Chapter 3.)

Restrictions On Landowners' Rights

What Kinds Of Restrictions Apply?

The fact that you own your land does not give you the right to do anything you want on it or with it. Your land rights may be restricted by the rights of others and by applicable laws:

- **Crown Rights**

The Crown has an ongoing ownership right to all land in Manitoba. If the Crown wants the land back, it can "expropriate" (take) it. However, you must be financially compensated.

- **Municipal Government Rights**

Municipal governments have the power to enter and control your land for certain purposes -- to detour traffic if the public road is blocked, to dig drainage ditches, to survey and appraise land, and to seize the land if you fall behind in your taxes.

- **Easements**

Easements are created when someone (usually a neighbour) is granted a right to enter, cross or use your land, or to prevent you from using it in a particular way. They may have a right to cut across your land to access their own, or they may be able to stop you from blocking a waterway. An easement will automatically develop if you knowingly let someone use or cross your land for more than 20 years; this is called "easement by prescription." Easements are also granted to public utilities such as Manitoba Telephone System and Manitoba Hydro -- to allow them to run cables through your land and enter the land to inspect or make repairs. Valid easements can be registered against your title at the Land Titles Office, to notify others that these particular rights exist.

- **Caveat**

A caveat is a registered interest in farm land that is created through legislation or by agreement between the owner and other(s). It allows the non-owning party certain specified rights regarding the property. For example, Manitoba Hydro often possesses caveats to allow it to enter onto and cross private properties.

Are There Restrictions On How I Use My Land?

Several laws can restrict how you use your farm property. Municipalities have been given the power to:

- regulate fires and explosive materials on your property;
- inspect buildings, and order you to repair or demolish them;
- order you to clean up accumulated garbage and old vehicles;

- stop or restrict the location of barns and animal pens;
- control your use of landfill and removal of topsoil;
- require you to control weeds on your land (in most cases);
- require that you enclose vacant land, grain stored in the open, and dangerous materials;
- restrict you from subdividing your land.

In addition, the provincial Clean Environment Act prohibits you from contaminating the air, water, and soil. Also, the federal Aeronautic's Act restricts the height of structures built on your land, and the provincial Occupier's Liability Act makes you responsible for seeing that land you occupy is reasonably safe for others who come on to it.

Are There Restrictions On Who Can Own Land?

There are no restrictions on acquiring or holding farm land for residents of Manitoba, municipalities, local government districts, agencies of the government, or family farm corporations. The Farm Lands Ownership Act defines a family farm corporation as one that is primarily engaged in farming, with at least two-thirds of all shares owned by a farmer and his/her immediate resident family. As well, the farmer and/or resident family must maintain control of the business.

All other potential landowners cannot hold more than a total of four hectares (10 acres) of farm land, with the following exceptions:

- those who held more than four hectares (10 acres) on September 26, 1984 -- when the Farm Lands Ownership Act came into effect;
- those specifically exempted from the restrictions by the Manitoba Farm Lands Ownership Board;
- retired farmers while still residents of Manitoba;
- family farm corporations where the shareholder farmer has retired or died (with certain exceptions);
- executors, administrators or trustees in bankruptcy -- as long as it is necessary to perform their duties;
- those who have inherited farm land;
- relatives who have acquired farm land from a retiring farmer (spouse, child, grandchild, brother, sister, nephew or niece).

A person who should not own more than four hectares (10 acres), must reduce his/her total farm land to that amount within three years of acquisition, or change his/her status. Anyone in violation can be fined up to $50,000, and can be forced to reduce his/her farm land interest to four hectares (10 acres). Before you sell

farm land to a person who is a non-resident, or to a non-family farm corporation, you should check whether the person or corporation is legally entitled to buy land in Manitoba.

The Land Registration System

How Does It Work?

In Manitoba, there are two systems of recording land interests -- the **Registration of Assurances** (known as the Old System),and the **Torrens System**. Your land is registered in either one system or the other -- but not both. It depends on the history of each particular piece of land.

- **Old System**

People who owned land in Manitoba before it became a province in 1870, and those to whom the Crown granted land between 1870 and 1914, had their titles registered under the Old System. Each time the land was mortgaged or transferred to a new owner, the mortgage document or deed had to be registered. Because a new owner risks losing the land if any past transfer was incorrect or improper, a new owner of land registered under the Old System must check each transfer back to 1870 or to the Crown grant in order to get proper title.

There are very few parcels of land still registered under the Old System. To determine how a piece of land is registered, you can check at the nearest Land Titles Office.

- **Torrens System**

Most of the property in Manitoba is held under the Torrens System of land registration, which applies to all crown grants made after February 20, 1914. As well, most land still held under the Old System is gradually being transferred to the Torrens System.

The Torrens System is based on three major principles. The first is compulsory registration of all transactions and claims involving land. Every dealing in land, in order to be recognized, must be shown on the title.

The second principle is what is termed the "indefeasibility" of the registered title. This means that any interest in the land must be shown on the title, in order for it to be enforceable over other interests registered against the title. For example, the holder of an unregistered mortgage cannot enforce his/her claim against a purchaser.

The final principle provides compensation for anyone whose interests are wrongfully lost by the issuing of a new title.

These three principles provide a land titles system that is reliable and relatively easy to use. A purchaser can do a title search at the Land Titles Office. If the land is registered under the Torrens System, he/she can examine the Certificate of Title and rely on the information registered on it. Unlike the Old System, no further checking will be required. This makes conducting land transfers easier, faster, and less expensive.

The Sale Process

How Does It Work?

- **Starting the Sale**

A buyer and seller can be brought together in many ways. Usually, the seller advertises the property or lists it with a real estate agent. However, sometimes a buyer will approach an owner of land on his/her own initiative.

- **Negotiation**

The seller and potential buyer will first talk about the sale to see if an agreement is possible. If he/she is interested, the buyer will attempt to negotiate for the most favourable price and sale terms. If a real estate agent is handling the sale, he or she will usually negotiate on the seller's behalf.

- **Offer to Purchase or Offer for Sale**

The buyer will formally propose to buy the seller's land by making an "offer to purchase." Usually in written form, it sets out the terms and conditions that the buyer is prepared to meet. However, sometimes the *seller* will want to set the terms of the sale, and will make the buyer an "offer for sale."

If the person receiving the offer to purchase or offer for sale accepts, then both parties are bound to its terms. The accepted offer is a contract for sale -- more commonly referred to as a sales contract or sales agreement.

- **Counter-Offers**

If the person receiving the offer proposes a change in its terms, he or she will make a "counter-offer." It is a *new* offer to purchase or offer for sale, and the original offer will become void. The counter-offer can be accepted -- or another counter-offer proposed.

- **Acceptance or Rejection of the Offer**

An offer to purchase or offer for sale (or counter-offer) is accepted when the other party agrees to its *exact* terms and conditions. If this party does not want to do so, there is the choice of counter-offering or rejecting the offer altogether.

- **Contract for Sale**

Once an offer is accepted, it becomes a binding sales contract. (See Chapter 1 on contract law.)

- **Clearing Title**

Transferring a "clear title" means that *all* rights to, and full ownership of, the property pass to the buyer. In other words, there are no mortgages, liens or caveats (easements, lease claims, etc.) on the land that will become the buyer's responsibility upon the sale. This information is attached to the land title, and can be found by conducting a "land title search" at the nearest Land Titles Office. The seller is generally responsible for finding and eliminating claims of others to the property, and by doing so, clears the title. However, there may be easements and caveats that cannot be eliminated, and the land will be transferred to the new owner with these conditions stated on the title.

- **Payment and Transfer of Title**

During the final stage of the sale, the buyer will pay the agreed purchase price and, in return, will receive title to and possession of the land.

Land Expropriation

What Is Expropriation?

Expropriation occurs when an authorized government department takes land without the consent of the owner. It must, however, compensate the owner. Both the federal *and* provincial governments have statutes which permit them to expropriate land, but the information presented here applies only to expropriation in Manitoba by the province, cities, towns, and municipal bodies.

What Is The Required Procedure For Expropriating Land?

Before the government -- the expropriating authority -- can expropriate, it must make a "declaration of expropriation" to either a municipal council, board of trustees, or authorized member of the Executive Council, or the Lieutenant Governor in Council (called a "confirming authority"). The expropriating authority then files a notice of intended expropriation at the Land Titles Office, where it is registered on the appropriate Certificates of Title.

Next, the expropriating authority delivers, to the registered owners of the affected land, a notice of the intended expropriation -- within 30 days of signing the declaration of expropriation. The notice is also published in a local newspaper. If no objection to the expropriation is made, the confirming authority must confirm the declaration of expropriation within 120 days of the request for confirmation, or it will have been "deemed" to be refused.

Within 120 days of registration of the notice of declaration, the expropriating authority must present a written offer of compensation for the land (usually market value). Upon acceptance or "deemed" acceptance, a notice of possession can be served upon the landowner. Thirty days after tne notice of possession for *occupied* lands, and 10 days after the notice for *unoccupied* lands, the land can be taken over.

What Can I Do To Stop My Land From Being Expropriated?

There are two ways to attempt to block an expropriation of your land. First, you can file a "notice of objection" within 30 days of the notice of the intended expropriation. It should include the nature of the objection and the grounds upon which it is based. It can be filed by anyone with an interest in the land (including the land owner's future heirs or a person leasing the land). An appointed inquiry officer then holds a public hearing to determine if the intended expropriation is fair and reasonably necessary to achieve the expropriator's objectives. At the conclusion of the hearing, the inquiry officer makes a report, which the confirming authority uses to make a decision. If the decision is to continue with

the expropriation, the confirming authority registers the transfer at the Land Titles Office. You cannot appeal this decision, unless you can prove that the expropriation procedure has not been followed.

The second way to stop an expropriation is to apply to a court to have the declaration of expropriation quashed. This must be done within six weeks of the publishing of the order confirming the declaration of expropriation. Anyone can use this procedure, but you must demonstrate that the expropriating and/or confirming authorities have not complied with the Expropriation Act.

Can The Government Come Onto My Land Without My Permission?

A government body considering expropriation has the right to enter lands without the consent of the owner in order to survey, examine, and appraise the land.

What If I'm Not Being Fairly Compensated?

The expropriating authority will offer what it believes to be "fair market value." If you disagree, you can appeal to the Land Value Appraisal Commission, which will hold a public hearing. All parties attend, and can be represented by a lawyer. Witnesses are called, evidence is submitted, and the commission then decides on an amount of due compensation. This could include market value of the land, disturbance costs, damages (perhaps market value decrease on remaining land), special economic advantages, or special value of a residence.

If one of the parties disagrees with the commission's decision, he/she/it can ask the Court of Queen's Bench to determine compensation. Further appeal is made to the Court of Appeal.

Leasing Land

What Is A Lease?

In a lease, a property owner grants possession of the property to another for a specified term, in exchange for rent. The person who grants the lease is the landlord or "lessor"; the person to whom it is granted is the tenant or "lessee."

Why Would I Want To Lease Land?

Leasing land allows beginning and small farm operators to acquire land and increase their incomes. Producers can also lease land to increase their land base, and reduce their per-unit cost.

What Are The Advantages?

- As a tenant, you can expand production without financing land purchases (reduced capital investment).
- As a tenant, you can acquire suitable land for growing special crops.
- As a tenant, you will have increased flexibility in farm planning decisions.
- As a landlord, leasing out your land to family members may help facilitate an inter-generational farm transfer.
- As a landlord, you can earn retirement income on real property.

What Are The Disadvantages?

- Rent paid to a landlord over a long time does not contribute to equity.
- Any appreciation in land value goes to the landowner.
- As a tenant, you have no sense of ownership.
- A tenant has less security of tenure.
- Short-term leases may discourage long-term farming practices that promote efficiency, soil conservation, and improvements.

What Are The Tax Implications If I Lease Out My Land?

When farm land is leased to someone other than your spouse, child, grandchild, or great grandchild, and you want to transfer this land to your child, you lose the ability to avoid tax on capital gains with the family farm rollover provision.

A second implication is that the higher capital gains exemption on farm land may be lost if the appropriate rules are not met.

Finally, while rental income is included as earnings in calculating the maximum RRSP contribution, it is not considered in calculating allowable Canada Pension Plan contributions.

Do I Need My Spouse's Consent To Lease Out Land?

You must have written consent from your spouse in order to lease *homestead land* for more than three years. Homestead land can be any land(s) upon which you have both lived since marriage [up to a maximum of 129.5 hectares (320 acres)].

Should I Register The Lease At The Land Titles Office?

A short-term lease -- for less than three years -- or land that is occupied by the tenant, does not have to be registered at the Land Titles Office. Also, the tenant does not need to file a caveat (legal claim) to protect his rights. However, if a tenant is leasing for longer than three years, he/she should register the lease on the land title to protect his/her rights.

What If The Property Is Sold?

Leases, especially those for more than three years, should be registered at the Land Titles Office in order for a tenant to best protect his interests. As well, the person or company who owns (or holds interest in) the property must consent to the lease. By registering your lease, you will be notifying any future interest-holders in the land of your leasing rights, and they must accept this as a condition of acquiring an interest. If they do not, you should be compensated.

Should The Lease Be In Writing?

It is common sense that all leases should be written to avoid disputes over terms of agreement and obligations of each party. However, leases for more than three years *must* be in writing and must be signed by all parties to the lease.

What Terms Are Automatically Included In A Lease Contract?

Unless the lease states otherwise, it is implied in all leases that the tenant will pay the required rent at the specified time, and will keep the leased property in good repair. Repairs do not apply to residential tenancies. It is also implied that the landlord has the power to enter the leased land to check its state of repair, to leave written notice of any repairs to be made by the tenant, and to take possession of the land if the rental payment has been in default for more than two months.

What Terms Should Be Included In A Lease?

The following *basic* terms should be included in a lease:

- names and addresses of the landlord and tenant;
- legal description of the land to be leased;
- duration of the lease;
- amount of rent and when due;
- how the land is to be used and any restrictions on use;

- option to renew the lease;
- option to purchase the leased land;
- any particular farming requirements;
- right of the tenant to sublet;
- responsibility for loss or injury caused by the tenant;
- rights of the parties upon breach of the lease;
- what will happen if of one of the parties dies.

Depending on the complexity of the individual circumstances, additional terms may be required. For more information, consult the Manitoba Agriculture booklet, *Land Leasing Agreements*, which contains sample lease agreements.

What Kinds Of Leasing Arrangements Are There For Crop Land?

There are three common kinds of leasing arrangements: **crop share leasing, cash leasing,** and **flexible cash leasing.**

What Is A Crop Share Lease?

Under a crop share lease, the landlord's rent is a share of all crop sales -- according to a pre-determined split. Under the most common split, the landlord receives one-third of the crop sales and the tenant gets two-thirds.

In a crop share lease, the landlord usually supplies the land and buildings, and the tenant provides the labour, machinery and operating expenses. Often, payment of crop inputs -- such as fertilizer and chemicals -- is divided between the landlord and tenant in the same proportion as the crop sales are divided.

- **Advantages**
  - Landlord and tenant share in production and price risk in the same proportion as the crop is shared.
  - The rent varies with the value of production and is paid when the crop is sold.
  - In some arrangements, the landlord pays part of the crop inputs such as fertilizer and chemicals.
  - An inexperienced tenant may be able to utilize the management expertise of a landlord with farming expertise.
  - Providing the tenant is a good manager, the landlord may make more money in a crop share lease in the long run than in other leasing arrangements.
  - Long-term farming practices can be adopted by the tenant, which will increase land productivity and conserve the soil.

- **Disadvantages**
  - If a tenant has superior farming skills, the extra profits generated because of these skills must be shared with the landlord.
  - The landlord might be able to influence the cropping decisions of a tenant.
  - If the tenant is a poor manager, the landlord may make less money than in other lease arrangements.
  - The rent received by a landlord is dependent upon the integrity of the tenant.

What Is A Cash Lease?

In a cash lease, the tenant pays a fixed rental amount to the landlord for using the property -- usually calculated on a per-acre basis. The tenant usually receives all of the income, and pays all expenses other than taxes and building insurance.

- **Advantages**
  - The landlord can receive a guaranteed return.
  - The tenant has more flexibility and independence in production and management decisions.
  - The results of a tenant's superior farming skills need not be shared with the landlord.
  - Detailed records on crop yields and inputs need not be shown to the landlord.

- **Disadvantages**
  - The tenant assumes all production and marketing risk.
  - Rent might have to be paid in advance of crop sales.
  - Leases are generally short term due to periodic changes in grain prices.
  - The landlord will not receive the benefit of high prices or unusually good crops.

What Is A Flexible Cash Lease?

The flexible cash lease combines the advantages of both cash and crop share leases. The tenant receives the income from all crop sales, but the annual rent paid to the landlord varies with crop prices. This allows the risk of changes in grain prices to be shared with the landlord.

- **Advantages**
  - The tenant has greater independence in decision making than in a crop share lease.
  - The risk of changes in grain prices is shared with the landlord.
  - The results of a tenant's superior farming skills need not be shared with the landlord.

- Leases with longer terms can be negotiated, thus encouraging the use of better farming practices.

- **Disadvantages**
  - The tenant assumes all risks in crop production.

Custom Farming Arrangements

What Are They?

Custom farming arrangements provide an alternative to leasing for a landowner who wishes to remain classified as a farmer for income tax purposes. These arrangements allow a landowner to maintain close control of the farm business without becoming actively involved in operations.

They include custom hiring agreements, joint venture farming agreements, and farm partnership agreements. (Joint ventures and partnerships are discussed in greater detail in Chapter 3.)

What Are The Advantages?

- The capital gains rollover provision can be preserved by the landowner.
- The higher capital gains exemption on farm land is maintained by the landowner.
- The landowner can make contributions to the Gross Revenue Insurance Plan (GRIP), to stabilization plans, and to the Canada Pension Plan, based on these earnings.

What Are The Disadvantages?

- The landowner assumes all risk.
- All farm operations must be arranged through the landowner.

How Can I Get More Information?

Ask for the following publications:

- **Land Leasing Agreement**
- **Legal Concerns of Buying and Selling Farm Land**
- **Crop Land Leasing Agreements**

Available from:

Publications Distribution Centre
Manitoba Agriculture
Room 805 - 401 York Avenue
Winnipeg, Manitoba
R3C 0P8 or phone 945-3846

or your local agricultural office

Chapter 5
The Farm Machinery and Equipment Act

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Farm Machinery And Equipment Act

Am I Protected Legally When I Buy Farm Equipment?

Yes. **The Farm Machinery and Equipment Act** protects farmers when they buy equipment by governing the purchase, delivery and repair of it. When you buy new machinery, your dealer must give you a brochure detailing your rights under the Farm Machinery and Equipment Act.

The Farm Machinery and Equipment Act applies only to **new** machinery. As well, new machinery is covered by the Sale of Goods Act. Used farm machinery and equipment is covered under contract law.

What Is The Farm Machinery and Equipment Act?

The Farm Machinery and Equipment Act requires dealers to deliver new machinery and equipment to farmers on time. It also makes dealers responsible for providing timely and reliable repair service to this machinery and equipment.

The Farm Machinery and Equipment Act also legislates the procedures that must be followed by lenders if a farmer defaults on a loan used to purchase farm equipment covered by the act.

Who Is Responsible For The Farm Machinery Act?

The Farm Machinery Board, which is made up of farmers, dealers, and manufacturer representatives, administers the Farm Machinery and Equipment Act. It sets policies and makes decisions on requests for permission to repossess farm equipment. The Farm Machinery Board is responsible to the Minister of Agriculture.

If you have a problem or need assistance regarding any of the machinery covered by the Farm Machinery and Equipment Act, you should contact the Farm Machinery Board in Winnipeg (see end of Chapter).

Warranties

What Does The Farm Machinery and Equipment Act Cover?

The Farm Machinery and Equipment Act applies to *new* farm machinery and equipment purchased in Manitoba for more than $1,000, that is used in the production of food for off-farm consumption.

The Act specifically *excludes* cars, trucks, snowmobiles, all-terrain vehicles and trailers. It also excludes machinery or equipment that is used, or has been purchased at an auction, estate sale, receivership sale or bankruptcy. Problems encountered with farm equipment in these excluded categories may be covered in the Consumer Protection Act or in the Sale of Goods Act. (Consumer Protection Act deals only with consumer products with a retail sale value of less than $25,000.)

What About Warranties?

Tractors must be warranted for a minimum of 1,500 hours or two years, whichever comes first, and **combines** for a minimum of 300 hours or two years, whichever comes first. All other farm machinery or equipment must be warranted for 12 months. Warranties start on the date the farm equipment is delivered to the farmyard, and only apply to the original purchase.

Dealers cannot attempt to limit their liabilities by making agreements with farmers that differ from the minimum warranties set out by the Farm Machinery and Equipment Act. However, a farmer can waive the labour and/or transportation part of the warranty, but it must be stipulated in the contract.

What Costs Must Warranties Cover?

The Farm Machinery and Equipment Act requires that a warranty must include the costs of repair parts and labour, and transportation (if needed) of the machinery for a maximum of 50 miles from the dealer's repair shop. Transportation only applies if the machinery cannot be driven or delivered by the farmer due to its condition.

Are All Parts Covered By Warranty?

No! Parts or components that are covered by the Farm Machinery and Equipment Act include diesel pumps, air conditioning units, hydraulics, starters, alternators and most electrical system components. They are warranted for two years or 1,500 hours in a tractor, two years or 300 hours in a combine, and one year in all other machinery. Replacement parts must also be warranted for one year or until the original warranty expires.

Parts that are not covered by the Farm Machinery and Equipment Act include ignition parts, lubricants, chemical liquids, spark plugs, fuses, bulbs and filters.

Parts subject only to the warranty of the manufacturer include tires, batteries, radios, belts, tape decks, cigarette lighters and ventilating fans.

None of the warranties provided for by the Farm Machinery and Equipment Act apply to repair work resulting from normal wear and tear, or to equipment that has broken down due to negligent operation.

What Happens If My Machinery Or Equipment Does Not Operate Properly?

The Farm Machinery and Equipment Act allows for a 10-day trial period, starting the day you first use the equipment. If the equipment does not function properly, you must notify the dealer of the problem -- either by sending a registered letter or by hand delivering a notice. The dealer then has seven days to fix the machinery or equipment.

If the dealer fails to correct the problem, you must then send or deliver a notice that cancels the contract. It should be sent within three days after the expiry of the seven-day correction period. You should also contact the Farm Machinery Board because this is usually a difficult undertaking.

How Quickly Should I Get Replacement Parts?

The Farm Machinery and Equipment Act requires a dealer to make replacement parts available to the original buyer for 10 years after the machinery is purchased. They must be available at your dealership within 14 days of you ordering them. If you order parts on an emergency basis, they must be on hand at the dealership within 72 hours of ordering.

Time allowances do not include Saturdays, Sundays or holidays, nor do they apply to circumstances beyond the dealer's control.

Purchases

What Happens If New Equipment Cannot Be Delivered On Time?

The dealer must forewarn you five days ahead of delivery date if he/she cannot meet the deadline for delivery set out in the contract. You then have a choice of either cancelling the contract or agreeing to take late delivery of the equipment you purchased.

If you decide to take late delivery, the dealer is required to loan you replacement equipment or pay for the rental of equipment to replace the machinery you ordered. However, *the dealer does not have to provide for replacement equipment if the reason for late delivery is beyond his/her control or the control of the manufacturer.*

The dealer also has the option of cancelling the contract if he/she cannot deliver the machinery or equipment on time, provided you are given notice 15 days prior to the agreed delivery date. If this happens, the dealer must give you a refund on all payments provided.

Security

What Happens In The Case Of A Loan Default?

If a loan for machinery covered by the Farm Machinery and Equipment Act is in default, the lender must file an application with the Farm Machinery Board in order to proceed with repossession. A copy of the application must also be sent to the farmer. The Farm Machinery Board will then request that the farmer contact it within seven days, and will make a decision based on the information provided by both parties.

If equipment is properly repossessed or voluntarily surrendered, the lender cannot pursue further legal action against the farmer to make up any shortfalls that occur when the equipment is sold. However, the farmer no longer has any rights in the equipment.

The Board's decisions are legally binding, but decisions can be appealed to the Court of Queen's Bench.

Does The Farm Machinery and Equipment Act Cover Liens?

A lien on equipment means that the buyer gets possession and use of it, but the lienholder (bank, credit union or dealer) keeps title until payment is complete. The Act says that the lien must be specified in an "lien note," and must be part of the contract.

What Other Protection Does The Act Provide?

The Farm Machinery and Equipment Act provides protection to farmers signing contracts for machinery. It stipulates that a contract signed by a buyer does not become legally binding until the dealer signs it and delivers it to the buyer or deposits it in his/her post office. This does not apply if the buyer pays the full purchase price and takes delivery of the equipment.

The Act also says the contract must be explained to the buyer, step by step, if he/she cannot understand the language in which it is written.

Sources Of Information:

What If I Have A Question Or A Problem?
Contact the Farm Machinery Board at:

Room 914 - 401 York Avenue
Winnipeg, Manitoba
R3C 0P8

Phone: 945-3856
FAX: 945-6134

Chapter 6
Personal Property Law

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Personal Property

What Is "Personal Property"?

The law of property concerns "real property" and "personal property." Personal property deals with all forms of property -- except land -- and is called "personality" or "chattels." Real property deals with land and all things attached to land, and is discussed in Chapter 4.

Protection of possession is a main goal of personal property law. The law presumes that a person in possession of goods has title to them. It will protect this possession against all individuals who cannot prove they have better title to the goods.

What Is "Possession"?

In personal property law, there are three types of possession: de facto possession, legal possession, and right to possession. These types of possession are not viewed equally; the last two give a person more rights than the first.

- **De facto possession** or custody means that a person has physical control of a chattel sufficient enough to prevent anyone else from interfering with it. This type of possession does not have specific legal protection because the person controlling the property may not have the "right" to possess it. For example, a thief has custody of a stolen chattel, but does not have the right to possess it.

- **Legal possession** occurs when a person has physical control of a chattel and has the legal right to control it for his own purposes. This type of possession is recognized and protected by the law.

- The **right to possess** refers to a person's right to physical possession of a chattel, even if she does not have custody of it. This type of possession protects unlawful interference with possession of a chattel. For example, if your car is stolen, you no longer have physical possession. The thief has de facto possession, but you still retain the right to possess the car. This right overrides the type of possession exercised by the thief.

What Is The Definition Of An "Owner"?

In personal property law, the "owner" of a chattel is the person with the best "title" to the property -- that is, the person with the best claim to the goods in question. The owner of a chattel has the right to control it, dispose of it (sell, mortgage or rent it), and to physically possess it. The owner will have his or her rights protected by the law.

In property law, the most desirable form of ownership is "absolute." This is where a person has the sole and exclusive right to possess a chattel, and this right cannot be lost without some act or default by the possessor. For example, you are likely the absolute owner of your watch and the clothes you wear. They are yours until you sell them or give them away.

However, sometimes ownership is "qualified." This means that it exists only for as long as possession lasts. For example, captured wildlife will no longer be owned by the captor if the wildlife should escape. In other words, it is possible to lose qualified ownership.

What Can I Do If Someone Interferes With My Personal Property?

When someone interferes with another's personal property, he or she can be sued "in tort," or if there was a contract, for breach of contract. A legal action will be possible, for example, if someone converts your property for her own use, thereby depriving you of the right to possession. This could apply where someone steals apples from your tree and eats them, or if a department store mistakenly delivers your purchased goods to someone else. You may sue to recover the value of the goods you lost.

In some cases, it may also be possible to recover the actual goods, instead of the money for their value. For further information see the Manitoba Agriculture publication *Contract and Tort Law for Farmers*.

Ownership

How Can Title To Personal Property Be Acquired?

Personal property can be acquired in several ways: **occupancy, creation, accession, confusion** and **transfer of title.**

- **Occupancy** refers to acquiring title to *ownerless* things by taking physical possession of them. Possessing ownerless things is rare, but would include the capture of wildlife, such as fish or game.

- **Creation** is a way to acquire title to new things that you create or construct. For instance, the author of a book creates a copyright, which is a form of personal property.

- **Accession** is an owner's right to possess everything that his or her property produces (such as a cow's calves), and everything that is added to his or her property (such as a tape deck in a car).

- **Confusion** refers to a situation where goods belonging to different persons get so intermingled that they can no longer be distinguished. The parties involved become "owners in common" of the mixed property (see Chapters 3 and 4). An example would be if similar goods belonging to different people get mixed together during shipping. If a person causes confusion by a wrongful act, the innocent person becomes sole owner of the property.

- **Transfer of title** is the most common way of acquiring title to goods. This means that someone else transfers a title by selling or giving you their property. However, you should be aware that the transferor (the person who is transferring title) cannot give you a "better" title than the one he has. For example, if someone gives you a book that she had borrowed, you cannot become the owner of it. The transferor was not the owner and could not pass title of the book to you.

What Happens If Someone Sells Me Personal Property She Does Not Own?

In many cases, you would have to return the property to the rightful owner, and attempt to recover your money from the seller.

However, The Sale of Goods Act provides exceptions to this rule in order to protect consumers. In some situations, it will allow title to pass to the buyer.

For example, if the sale was made under a court order, by executors of an estate, or under statutory power of sale (such as a garage keeper's lien -- discussed later in this chapter), then the buyer is allowed "good" title to the property.

Another exception is if the buyer has no "notice" of a defect in the seller's title, or no way of knowing that the seller does not have good title. For example, if Sally sells her tractor to Bill and he gives her a worthless cheque, Bill's title is good only until Sally notifies him that the contract has become void due to the worthless cheque. Until she does, Bill could legally sell the tractor to Brenda and pass a good title to her. If he did, Sally could not claim her tractor back, but would be forced to sue Bill for the purchase price of the property.

A third exception is if the seller uses a "mercantile agent" to sell the property. A mercantile agent is someone who has the authority to sell or buy goods as an agent for the owner, and is usually in the business of doing this for others. If the mercantile agent possesses the goods with the owner's consent, for a purpose connected with his or her usual course of business, and then sells the goods in the ordinary course of business to a buyer who purchases the property in good faith, the buyer receives good title. For example, if Mary gave her car to John, a used car salesman, while he was working at the car dealership, and during work hours he sold the car to Jane, she would have good title to the car. Even if it turned out that Mary had changed her mind, but had not informed John before he sold the car, she could not get her car back.

What If I Find Lost Property?

The basic rule is "the finder of lost goods acquires good title against all the world -- except the true owner." When there are competing claims for the right to keep lost goods, one must look at who had prior possession. Generally, if you find lost goods on a public property, your claim to the goods cannot be defeated by anyone except the true owner.

However, if you find the goods on someone else's property, the landowner may be able to claim prior possession of the goods. If you found the goods attached to his property or under the ground, the landowner could defeat your claim since he owns the land and everything on it -- even if he is not aware of its existence. If you found the goods lying on the surface of his land, the landowner would have to prove that he had prior knowledge of the chattel's existence and demonstrate that he attempted to exert some control over it.

If an employee finds something during the course of her job, then the employer's title is superior.

No one is obligated to pick up lost articles. If you do, you become responsible to the true owner for the care of the property, and are expected to treat it as well as a reasonable person would treat her own. However, you are only liable for gross negligence or converting the goods to your own use.

Can I Pass Title By Giving A Gift?

A gift is a free transfer of title to goods. It can legally be given between living persons, by will, or by someone in contemplation of their death. Again, the donor cannot transfer better title than he or she has.

The law is very strict when it comes to gifts, because there is a great potential for fraud. A promise of a future gift cannot be enforced unless it is part of a contract or written under seal. The main problem involves situations where the court suspects that the donor gives a gift merely to avoid having chattels repossessed by creditors. For example, if a farmer is worried about going bankrupt, he or she may give a daughter two sections of land. If creditors will go unpaid because of a gift, very clear evidence of a valid gift must be present -- especially if the gift was made to a family member.

The clearest evidence of a valid gift is the actual delivery of the goods from the donor to the recipient. There must also be an intention to transfer ownership. If the manual delivery of the item is impossible, a court may accept some other equivalent act that passes exclusive control of the chattel to the new possessor. For example, giving someone the only set of keys to a car, rather than attempting to hand over the car itself, will be enough.

It may be difficult to prove that delivery has been made when the donor and recipient live in the same house, because they appear to possess everything together. More than mere words of gift are required. That is, you must do more than say: "Here, I'm giving you this chair." A court will look at the situation to see whether the donor has done all that is reasonably possible to transfer possession. The safest way to guarantee that a valid gift has been made in this situation is to make a deed for the gift and put it under seal. (See Chapter 1 on Contract Law.)

Sometimes gifts are given in contemplation of death. A dying person may intend to give someone a gift immediately, but the gift will only be valid after she has died. It is important to note that gifts made in contemplation of death supersede the intentions expressed in a valid will. Under common law, gifts made under such circumstances take effect upon death a split second before gifts made through a will. For this reason, a court will scrutinize gifts given in contemplation of death closely. If the donor survives, the gift is automatically revoked.

What Happens If I Temporarily Give Someone My Property?

When one person has legal possession of another person's goods according to an agreement between them, it is called "bailment." The person who owns the property is the "bailor," and the person who temporarily receives the property is the "bailee." There is an understanding between the two that the identical goods will be returned to the owner. A common example of a bailment occurs when you leave your clothes at the drycleaner's. You are the bailor who delivers your clothes to the cleaner (bailee), on the assumption that the clothes will only be kept until they are cleaned, and that the identical clothes will be returned to you.

Transfer of ownership does not occur in a bailment, only a transfer of possession. It is not an exchange, because the same goods must be returned. (Depositing money in the bank is not a bailment, because you do not get the identical bills and coins back later.)

The person who has care of your goods has a certain responsibility, which depends on the nature of the bailment. If the bailee is being paid for some service while the goods are in her possession, she has more responsibility than if she is merely doing you a favour by keeping them. Basically, a bailee must treat the property with reasonable care, keep it free from damage, and without negligence.

Can People Limit Their Liability When My Property Is In Their Hands?

A clause in a contract that limits liability for loss or damage of goods is called an "exemption clause." People who are in the business of being bailees (such as parking lot attendants and dry cleaners) typically attempt to exempt themselves from liability by including these clauses in the bailment contract. This can take the form of words printed on the back of a parking lot token or a sign on the wall that states "NOT RESPONSIBLE FOR LOST ARTICLES." This is acceptable, as long as the customer knows the conditions and is willing to accept them.

However, in many situations, you are not even aware of the exemption. For example, when you purchase an airline ticket, you contract with the airline. The contract includes their terms printed on the ticket, and if you read the fine print, you would likely find a clause exempting the airline from liability for loss or damage to your baggage, however caused. In this situation, you may not be aware of the clause because you might not have read the ticket. However, you will likely be "deemed" to have read it. And even if you do read the ticket, you may be in a weak position to object. After all, if every airline has exemption clauses, what can you do? You are not in an equal bargaining position with the airline. You either accept the conditions or you don't fly.

Fortunately, the courts have stepped in to protect the consumer in this type of situation. Where the exemption clause is wholly unreasonable, a court will rule that it does not apply. However, generally a court will not help you if you have signed a document because the signer is "deemed" to have read the document, and "deemed" to know, understand, and accept all the conditions it contains.

What If I Involuntarily Have Someone's Property?

"Involuntary bailment" is a situation where the bailee is in receipt of someone else's property, and neither person agreed to the bailment. An example would be if you accept the delivery of someone else's goods that have been sent to your house by mistake. If you do not touch the goods, you are under no obligation to do anything with them. Once you accept them, however, you must exercise reasonable care in dealing with them.

Security

What Is A "Pledge"?

A pledge of goods is a form of security for a debt. The debtor (pledgor) delivers his goods to the creditor (pledgee), who keeps them until the debt is discharged. The pledgor does not lose title to the goods, only possession of them. The pledgee does not gain ownership of the goods, only possession and all of the corresponding rights that go with possession. These rights include the right to sue someone else who interferes with this possession, and the power to sell the pledged chattel should the pledgor default in payment of the debt.

A pledge of goods is a form of bailment. As such, the rules of bailment apply. The pledgee (creditor) is liable for ordinary negligence, and must take reasonable care of the pledged goods.

What Is A "Lien"?

A lien occurs when one person has the right to possess goods belonging to another, until certain debts or charges against the goods are paid. Unlike a pledge, the lien-holder does not generally have the right to sell the goods. However, there are exceptions. For example, The Warehouseman's Lien Act gives a warehouseman the right to keep possession of goods until the owner pays the charges. It also gives him the right to eventually sell the goods if the debt remains unpaid.

Another example of right of possession on a lien is The Garagekeeper's Act which gives any business that services vehicles a right of lien upon vehicles for services rendered. If the car is still at the garage, the garagekeeper can keep it until the bill is paid. The Act also gives the garagekeeper the power to sell the vehicle if the debt has not been paid within two months. The vehicle must be sold at public auction, and there are rules regarding advertising and sale.

How Can I Be Sure A Person Has The Right To Sell Something?

If you need to know if a person has the right to sell or pledge the item, or if any other person or corporation holds title to the item or some form of lien against it, you can check the Personal Property Registry. It has been established under the Personal Property Security Act to allow any individual to determine these things. A search of the Personal Property Registry will provide you with warning of the existence of any garagekeeper's liens and will ensure that the apparent owner of the item is in fact the real owner (and has the right to sell the item or pledge it as collateral).

It will also let you know if there are any "security interests" against the property. A security interest is when property belonging to a person or corporation is pledged as collateral to someone else in order to guarantee that a loan will be repaid. The lender, called the secured party, is said to have a security interest in the property. If the loan is not repaid, the lender may be able to repossess the property. If the secured party has registered the security interest in the Personal Property Registry, then this interest can be maintained even if the property is sold by the debtor.

How Do I Search The Personal Property Registry?

A search can be started at any branch inquiry office, located in Beausejour, Brandon, Dauphin, Flin Flon, Killarney, Minnedosa, Morden, Portage la Prairie, Russell, Selkirk, Swan River, The Pas, Thompson, or Virden. When you have paid the appropriate fee, you will be connected by phone to the Central Registry Office in Winnipeg, where the search is actually conducted. Or, you could go directly to the Central Registry Office:

Personal Property Registry
405 Broadway
Winnipeg, Manitoba
R3C 3L6
Phone: 945-3123.

The search will then be conducted while you wait. If neither option is possible, you can always mail in a request -- although it will take longer to process. A verbal or printed report is also available for any search.

To conduct a search, you must provide the exact name, address, and a birth date of the debtor. If the debtor is a corporation, you'll need the exact corporate name and address. In the case of a vehicle, only the serial number is required to perform a search for any registered claims against it.

When Specifically Should I Search The Personal Property Registry?

No search is required if the personal property (whether new or used) is being purchased from a dealer, and the sale is in the ordinary course of business of the dealer. This is because a responsible dealer will guarantee that the property is free of security interests.

However, if the personal property is being purchased privately, you should take steps to protect yourself from the risks normally assumed by the dealer. There is a possibility that the property may have been previously financed by the seller

or the previous owner, and that an undischarged security interest may exist. Therefore, the name of the seller and of each previous owner should be searched for an outstanding security interest. With vehicles, a search by serial number should also be made.

How Do I Register A Security Interest?

A security interest is registered by filling out a financial statement (on a special form required by the Personal Property Security Act), and then paying the appropriate fee at the Personal Property Registry. This can be done either in person or by mail.

Registration gives you the legal right to enforce your interest against a third party, and could also give preference in the event of the debtor's bankruptcy.

Sales

Is There Anything That Regulates The Sale Of Non-Real Estate Property?

The Sale of Goods Act deals with the sale of "goods," and applies to contracts involving property, but not real estate or services. Machinery, equipment, furniture, appliances, grain and lumber are examples of goods to which the Act applies. Money in some form must be part of the transaction, as the straight barter of goods does not fall within this Act.

The Sale of Goods Act says that in a contract of sale, there is an implied condition that the seller has the right to sell the specific goods, unless the contract shows differently. It also assumes that the goods are free from any charge or encumbrance, in favour of any third party that is not known to the buyer -- before or at the time the contract is made.

The Sale of Goods Act states that where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. It also states that if the sale is by sample, as well as by description, all of the goods must correspond with the sample. For example, if you examine a sample of wheat, and find it to be a certain grade and variety, you have a right to expect that all of it will be the same as the sample. If not, you can reject the grain and get your money back, or you may also choose to accept the grain and sue for damages.

The Sale of Goods Act also states that in the case of a contract for sale by sample, the buyer should have a reasonable opportunity to compare the bulk with the sample. As well, the goods should be free of any defect that makes them unsaleable, and which would not be apparent on reasonable examination of the sample. The seller and buyer could agree to alter these implied terms by including an express term relieving the seller from any liability imposed by the implied terms.

The Sale of Goods Act also says that if you inform the seller of the particular purpose for the goods (instead of ordering by specific model and type), and rely on his skill or judgement (assuming the goods are of a description that are in the course of the seller's business to supply), there is an implied condition that the goods shall be reasonably fit for the purpose. *In any other situation, besides these covered here, if you don't examine the goods you are buying, you will not be protected by the Sale of Goods Act.*

It should be noted that the Sale of Goods Act actually provides protection to both buyer and seller.

What Does The Sale Of Goods Act Say About Payment?

Usually, the time of payment will be specified in the contract, but if the parties do not otherwise agree, the Sale of Goods Act says that the payment for the goods is to take place at the time of delivery. If a seller is not paid on time, she is not entitled to cancel the contract and have the goods returned. She must sue for the recovery of the price and/or damages.

What Does The Sale Of Goods Act Say About Delivery?

The delivery terms in a contract relate to three matters:

- **How many** goods to be delivered is an important term of the contract. If the seller delivers more or less of a good than is called for in the contract, the buyer may choose to cancel the contract and reject the goods. Or, the buyer could decide to accept the goods and pay for them at the contract rate.

- **When** the goods are delivered is another essential term. If the goods are not delivered on time, the buyer has the right to cancel the contract. If the parties do not specify a particular delivery date, but merely provide that the goods are to be delivered as soon as possible, then the time for delivery is considered to be a reasonable time, taking into account all circumstances.

- **Where** the goods are delivered is either to the seller's place of business, or wherever the goods are located when the contract is made. The parties could indicate differently, however, or a different intention could be implied from trade custom.

What Happens If Goods Are Damaged Or Destroyed?

The parties to the contract may agree in the contract about when the risk passes from seller to buyer. If they do not, there are five rules in the Sales of Goods Act for deciding this:

1. **Where there is an unconditional contract** for the **sale of specific goods** in a **deliverable state**, the property passes to the buyer when the contract is made. It does not matter if the time for delivery or the time for payment have been postponed.

2. Where there is a contract for the sale of **specific goods**, and the seller is bound to do something to the goods for the purpose of **putting them in a deliverable state**, the property does not pass until such things are done and the buyer has been notified that they are done.

   For example, suppose you agree to purchase a tractor from Helen, with the provision that before payment and delivery, Helen is to replace the tires. Before replacement, however, the tractor is stolen. Since the ownership of the tractor does not pass to you until the tires have been replaced, and until you have been given notice of the replacement, you are not bound to pay Helen the purchase price.

3. Where there is a contract for the sale of **specific goods** in a **deliverable state**, but the seller is bound to **measure, test or do something** to the goods for the **purpose of ascertaining the price**, the property does not pass until this act is done and the buyer has notice of it.

   For example, you agree to purchase a bin of wheat from Tom at a price of $165/t ($4.50/bu.), but before the quantity of wheat can be delivered, it is stolen. Since the wheat had not yet passed to you at the time it was stolen, you are not liable to pay Tom any of the purchase price. The goods were still at Tom's risk.

4. Where goods are **delivered to the buyer on approval** or other similar terms, the property passes to the buyer when she signifies approval or acceptance, or does any act confirming the transaction. If she does not signify acceptance, but keeps the goods without giving notice of rejection, and no time has been fixed for her acceptance, the goods become hers on expiration of a reasonable time.

   For example, say you take delivery of a chain saw on approval, and the seller says: "If you are not satisfied with this saw, return it by May 1, 1990." On May 5, you still have the saw, but on May 6 it is stolen. By this time, the ownership of the saw has passed to you, and you are therefore liable to pay the full purchase price.

5. Where there is a contract for the sale of **future goods by description**, and **goods of that description** are appropriated to the contract, either by the seller or the buyer with assent, the title to the goods passes to the buyer.

   For example, suppose you go to your feed supply company and order five tonnes of feed supplement. At some point in time, the company sets aside

the amount for you. Before you pick it up, it is destroyed by fire. The loss of the feed would be the seller's because the feed has not yet passed to you. This is because the setting aside of the feed does not amount to appropriation of the goods.

If the feed had been loaded onto your truck at the time of the fire, this would amount to "appropriation." Therefore, property in the feed would have passed to you, and you would be liable to pay the purchase price.

What Is The Consumer Protection Act?

The Consumer Protection Act covers the sale of goods and services that meet the following requirements:

- They are not bought for resale.
- They are not sold to a corporation.
- They must not exceed $25,000.
- They must not be used by the purchaser for the primary purpose of carrying on a business. As well, the Consumer Protection Act does not apply to any sale of new farm machinery and equipment covered under the Farm Machinery and Equipment Act.

Who Administers The Consumer Protection Act?

The Manitoba Consumer's Bureau administers The Consumer Protection Act, and is responsible for:

- issuing any of the licences required under the Act;
- mediating and investigating complaints, and prosecuting offenders when necessary;
- providing information to consumers.

How Does The Consumer Protection Act Affect Door-To-Door Sales?

Because a door-to-door sale is one made by a salesperson you did not contact, and the sale is made somewhere other than a regular place of business, there are special rules for these types of sale:

- You may cancel the sale at any time within four days, by sending a written notice to the company, at the address shown on the sale contract or on the invoice the salesperson gave you. You don't have to have a reason for cancelling the sale; it can be that you have simply changed your mind.

- At the top of the sales form there must be a printed statement of your right to cancel, and the address to which you can send the cancellation letter within the

four-day period. A copy of this form must be left with you at the time of purchase.

- If you cancel, you are entitled to your money or deposit back and the return of any trade-in given. You must return the goods that you purchased.

- Any door-to-door salesperson is required to be licensed by the Consumer's Bureau, and his/her company is required to post a bond with them. You should ask to see this license, and if the person is not licensed you should refuse to deal with him/her.

What Does The Consumer Protection Act Say About Credit?

Credit buyers and money borrowers have a right to know exactly how much the buying and borrowing is going to cost them. Any agreement should contain a clear description of the goods, and the actual cash price of the goods -- plus any additional charges, down payments, and/or the value of trade-in. However, a purchase credit agreement must also show the total amount of credit finance charges in dollars and cents, and as an annual percentage rate. It must also show:

- charges for insurance premiums (if any);
- actual fee to provincial authorities for registration of a document;
- the amount, due date, and frequency of payments;
- the unpaid balance of the cash sale price;
- delivery or installation charges;
- cash prices of any services included in the sale.

Can I Pay My Debt Ahead Of Time?

Buyers and borrowers can pre-pay their debts at any time before the full amount falls due. Where this is done, the seller or lender can only collect the amount of the loan or purchase, plus credit costs that have been earned to date.

What If I Fall Behind In Payments?

If you fall behind in payments on an item, and then pay the arrears and default charges you owe, you cannot be forced to pay the full balance owing on an instalment contract. Even if an agreement provides for "acceleration" (the complete balance due and payable on default), the Consumer Protection Act allows you the right to pay your account up to date. Once all payments in arrears and default charges are paid, you are allowed regular payments according to the terms of the contract.

However, in situations where the seller has reasonable cause to believe that the buyer's collateral is in jeopardy, and if the agreement allows, the seller may

accelerate and demand that the full balance owing be paid. When this occurs, the buyer must apply to the court for relief from this acceleration.

Under the Consumer Protection Act, a borrower cannot be forced to default his interest in goods used as collateral once the payments in arrears and default charges are paid, *except* for:

- debts secured on real property;
- debts that arise out of the sale of real property;
- debts owed by a corporation.

Sources Of Information:

Ask for the following publications:

- **Contract and Tort Law for Farmers**
- **Types of Security Contracts Available to Manitoba Farmers**

  Available from:

  Publications Distribution Centre
  Manitoba Agriculture
  Room 805 - 401 York Avenue
  Winnipeg, Manitoba
  R3C 0P8 or phone 945-3846

  or your local agricultural office

- **Consumer Rights and Responsibilities**
- **Licensing Requirements for Direct Selling**
- **Home Improvements Sold Door-To-Door**
- **Warranties and Guaranties**
- **Credit Transactions (pamphlets)**

  Available from:

  Consumer's Bureau
  114 Garry Street
  Winnipeg, Manitoba
  R3C 1G1
  phone: 1-800-782-0067

Chapter 7
Liability Law

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Liability Law

What Is Liability?

Liability is a breach of duty. Everyone has a legal duty not to harm other people or their interests, and if a person does, she may be held responsible and ordered by a court to compensate the victim. Liability is often referred to as "tort."

This chapter deals with the extent to which we must look out for the safety of others around us. For the most part, we are free to do as we please -- but only to the extent that it does not interfere with, or harm, others.

Because many of the "wrongs" that we do to others are accidental, liability insurance becomes an effective way of reducing loss. For example, liability insurance provides you with financial protection if, while spraying, you accidentally cause major damage to your neighbour's crop. The amount of coverage you need depends on your individual circumstances. Liability insurance is discussed in greater detail in Chapter 2.

What Kinds Of Things Can I Be Held Liable For?

You can be held liable for almost anything that causes injury to others. For instance, you may be liable if you are negligent, create a nuisance, keep dangerous things on your property, or if your pet injures someone. You may also be liable for trespassing, assault, slander and conspiracy.

Must I Be At Fault To Be Held Liable?

In most cases, to be found liable, you must in some way be at fault. However, you can be held liable *without* being in any way at fault *if* you keep dangerous things on your property or if your animals harm someone.

Am I Responsible For The Wrongful Actions Of My Employees?

An employer is responsible for wrongs committed by an employee if the employee's actions were part of his employment. For instance, you may be liable if your employee runs over a pedestrian while on his way to pick up supplies for you, but you will not be liable if the accident happened while he was making an unauthorized detour to visit a friend. Visiting his friend is not part of his employment.

How Long Does An Injured Person Have To Sue?

For legal wrongs other than contracts, an injured person must generally sue within two years. This two-year period begins when the injured person becomes aware of the wrong done to him/her. In some cases, this period may be longer or shorter, or it can be extended by a court.

Negligence

What Is Negligence?

Many people are injured by the careless acts of others. Negligence law determines for which acts people will be held responsible. For example, if you go through a stop sign and hit someone, you may be held negligent because you were not careful enough. (In addition, you will be charged with a highway traffic offense.)

When Can I Be Found Negligent?

We all have a duty to use care to avoid injury to anyone we can reasonably foresee to be affected by our acts. The law refers to this as a "duty of care." For example, it is reasonable to foresee that a car-driver's actions may affect her passengers, other motorists, pedestrians, bicyclists, and persons who are located or have property near the roadway. If the driver was to injure someone, she could be held liable if a court decided she had not performed her duty of care.

You could be negligent in your actions if you do not perform your duty of care. Some examples of when this might occur are when you operate or repair machinery, play baseball, or give advice to someone.

If you manufacture or produce defective products, you may be held liable for any damage and/or injury caused by that product. For example, if you are a milk producer and you do not take proper precautions to ensure that the milk is safe to drink, you may have to pay compensation to people who get sick as a result of drinking the milk.

Anyone occupying land has an obligation to take proper care to ensure that the people and property on that land will be reasonably safe. This includes trespassers as well as guests, but does not include snowmobilers or hunters who trespass. The only duty you have to them is to not deliberately or recklessly harm them.

In most cases, you cannot be held liable for something you have not directly done. However there are *some exceptions*:

- creating a hazard (For example, if you hit and kill a deer with your car and do not remove the carcass from the road, you may be held responsible if the carcass causes an accident.);
- failing to complete an action (For example, if you stop to help someone who is injured, and then leave the person before he is rescued, you may be held responsible for some of his injuries or his death.);

- betraying a trust relationship. (For example, a doctor has a duty to his patients, and it is reasonable for his patients to rely on him. If he betrays that trust, he could be found negligent.)

How Careful Do I Have To Be?

In deciding whether you did all that you were expected to do or whether you were negligent, a court would ask what a *reasonable* person would have done in the same circumstances.

Anyone involved in a professional activity (doctor, carpenter, mechanic, etc.) is expected to be just as skilled as her peers in the same field -- whether she herself is qualified or not. Children are required to exercise the care expected of other children of their age, intelligence, and experience. Other important factors include the likelihood of harm, the severity of the harm risked (greater care is expected in firing a bullet than when hitting a tennis ball), and the social value of the activity (a speeding motorist compared to a speeding ambulance driver on his way to an accident).

For What Kinds Of Losses Or Injuries Are People Compensated?

In the case of negligence, you can be compensated (given money) for almost any kind of injury or loss: broken leg(s), burned-down buildings, damaged equipment, loss of income due to injury, etc.

Do I Have Any Defenses If I Am Negligent?

The most important defense is the other person's *consent*. You are not liable if the injured person knew about the risk and consented to taking the risk. However, the consent must have been given without coercion (force or threat).

Another common defense is that there was *contributory negligence*, where the other person's injuries were caused in part by his own carelessness and in part by your negligence. In this situation, you are still partly to blame, so you will still be responsible for paying part of the damages.

Other defenses against negligence include insanity and diplomatic immunity. It should be noted that if you injure someone during an illegal or criminal activity, a court will generally not be sympathetic.

How Careful Must I Be To Prevent Injuries To People Visiting My Property?

Common hazards to visitors and trespassers include hidden ditches or holes, weak staircases, and slippery sidewalks and floors.

Whether you are an owner or renter, the amount of care you owe to a particular visitor will depend on which of three categories he fits into: **contractual entrant, invitee, or trespasser.**

- **Contractual Entrant**

A contractual entrant is a visitor who has been given permission to be on your property while he does a particular job (plough the fields or paint your house). You have a duty to see that your property is as safe as reasonable care can make it for such a person.

- **Invitee**

An invitee is also on your land with your permission. She can be there to conduct business, such as buying or selling your farm equipment, or can be there socially. Your duty to her is to take reasonable care to protect her from "unusual dangers" that are located in places you expect her to go. An unusual danger is one that the invitee would not expect to find on your land.

- **Trespasser**

A trespasser is the only type of person who is on your land without permission. If you think that a trespasser is likely to wander onto your land, you must warn him of any hidden (not obvious) dangers, with a sign or some other means.

If Someone Is Injured On My Property, Are There Any Defenses?

The two defenses that might apply when someone is injured on your land are "consent" and "contributory negligence." A visitor who knows about a danger, and still consents to come onto your property, may be responsible for some or all of her own injuries. This also holds where a visitor is negligent with regard to her own safety. Everyone is expected to use reasonable and ordinary care for his or her own safety.

Nuisance

What Is A Nuisance?

When a person is said to create a nuisance, it generally refers to the use of land in such a way that unreasonably interferes with the use and enjoyment of adjoining land. Whether an interference is unreasonable or not is decided by a court. Some examples of nuisances include factory pollution, noise from airplanes or racing cars, road barricades, fires, floods, gathering of large crowds, and smells from livestock farms.

There are two types of nuisance: public and private. A **public nuisance** is an interference that affects the general public, while a **private nuisance** affects a private citizen.

What Kinds Of Nuisances Are People Compensated For?

Damage to land or property, substantial convenience and annoyance, economic loss, and personal injury are all valid forms of damage in a nuisance complaint -- so long as the damage was reasonably foreseeable by the person creating the nuisance.

In deciding if it is unreasonable for you to put up with a particular nuisance, a court will look at several factors:

- the character of the neighbourhood (For example, a certain amount of noise and livestock smells are to be expected in a farming community, but will not be tolerated in the city.);
- whether the discomfort is more than an ordinary (not overly-sensitive) person living in that community is expected to endure;
- whether the nuisance is a continuous/recurrent situation;
- the social value of the activity (For example, road repairs are a necessary nuisance, but they must be done with the least interference possible.);
- the reason for the interference. (A court will not look kindly upon nuisances done out of malice or revenge.)

What Can I Do If I Am The Victim Of A Nuisance?

If you are the victim of a nuisance, there are three remedies available to you: compensation for damages, an injunction to stop the nuisance, and abatement.

Compensation for damages is when a court orders the person at fault to pay you for inconvenience, injury, loss, etc.

An **injunction** is a court order requiring the nuisance creator to put an end to the nuisance. It is usually ordered when damage compensation alone is not enough, as in the case of a factory polluting your water supply.

Abatement is a self-help method where, instead of taking legal action, a person suffering because of a nuisance takes steps on her own to stop or remove it. This remedy can only be used if you have asked the nuisance maker to end the nuisance and he has refused or ignored you. As well, you must not do more than is reasonable to rid yourself of the nuisance. For example, if your neighbour's tree overhangs your property, you may be entitled to trim it -- but not to chop it down.

If I Create A Nuisance, Do I Have Any Defenses?

There are two possible defenses that may excuse you from liability if you are involved in creating a nuisance: **prescription** and **legislative authority**.

- A **prescription** is when a long period of time without opposition to the nuisance goes by, thereby making it legal and preventing anyone from suing about it. For instance, if you have been draining water onto your neighbour's land for 20 years without permission, and she has made no attempt to stop you, you may have acquired a legal right to continue doing it. This remedy is only available in the case of a private nuisance, and is similar to an easement in land law (see Chapter 4).

- **Legislative authority** is when an activity authorized by a statute or zoning by-law creates the nuisance, thereby making it legal. A good example is a pulp and paper mill that has been approved through a by-law. Assumably, a certain amount of smoke will also have been authorized. However, if the mill creates more smoke than is necessary, the company may still be liable for creating a nuisance. It should be noted that sometimes a government may pass legislation preventing a business from being sued for creating a particular nuisance. In Manitoba, for example, the Nuisance Act states that a business is not liable for creating odours -- unless it is also violating some other statute.

What If I Store Dangerous Materials And They Escape?

This situation is known as a "strict liability tort," and it means you might be liable even if the damage is unintentional. For you to be found liable, the injured party must prove three things:

- that you accumulated some dangerous material on your land;
- that the accumulation was a non-natural use of the land;
- that the accumulation escaped and caused damage.

A **dangerous material** includes anything likely to cause harm if it escapes, such as an explosive or a chemical. However, almost anything can be dangerous if there is enough of it (water flooding your neighbour's land) or if it ends up in the wrong place (manure seeping into your neighbour's well). You may even be liable in cases where nature accumulates something on your land -- for instance, if you allow a large quantity of weeds to grow on your property and they spread to a neighbour's land.

Non-natural use of land usually involves some special use that increases the danger to others. For example, water collected in water mains under the street or in a dam will be considered a non-natural use, but water accumulating in an ordinary home plumbing system will not. Other non-natural uses of land include fumigation, herbicide spraying, garbage dumping, and the storage/transportation of gasoline. You are also liable for fire used for industrial or transportation purposes (a fire caused by tractor sparks).

Do I Have Any Defense If Dangerous Material Escapes?

Because the escape of dangerous materials makes you strictly liable, it usually doesn't matter if you were at fault or not. However, if you feel you were not at fault, there are some defenses available:

- Someone else did the act and you could not foresee, control, or prevent it (unexpected pranks).
- The injured party brought the damage upon himself (for example, dug a hole knowing there were water pipes underneath).
- The escape would not have harmed an ordinary neighbour (for example, if herbicide escapes your land and ruins your neighbour's "all-natural" vegetables).
- The injured party consented to the use by allowing it for a number of years without complaining.

Livestock

What If My Livestock Trespass On Someone Else's Land?

If your livestock -- including most farm animals, but not dogs or cats -- stray onto your neighbour's land, you are usually liable because this offense is considered to be a "strict liability tort." Under it, you can usually be held liable -- even if you had no part in it.

Are There Any Defenses If My Livestock Trespass?

If your livestock trespass onto someone else's property and cause damage, you may be able to use one of the following:

- Damage is the fault of the injured party. For instance, in Manitoba, a person has a duty to maintain fences if he has livestock. Therefore, if your neighbour keeps livestock, he cannot sue if *your* livestock wander onto his land through the holes in his fence.
- Someone else caused the damage without your knowledge (vandalized your fences).
- The injured party had consented to the trespass in the past.

What If My Animals Injure Someone?

This situation is also a "strict liability tort" which means you are more than likely liable for any injury or damage your animals cause, whether it is intentional on your part or not. There are three categories of animals -- **tame animals, vicious animals**, and **dogs**.

- **Tame Animals**

Whether an animal is tame or vicious is determined by its species, and not on the disposition of the particular animal. Tame animals include cats, rabbits, and horses. If your tame animal causes injury or damage, you are liable if you knew, or should have known, that the animal is dangerous (has bitten before) or is likely to cause damage (likes to eat your neighbour's prize roses).

- **Vicious Animals**

Again, whether an animal is tame or vicious is determined by its species -- and not on the disposition of the particular animal. Vicious animals include elephants, zebras, tigers, minks, ferrets, raccoons, snakes, and tarantulas. Vicious animals are kept at the owner's risk, and you will be liable in almost all cases -- even if your pet raccoon has never bitten or scratched anyone before.

- **Dogs**

The same rules that apply to vicious animals also apply to dogs. According to the Animal Husbandry Act, you will be liable even if your dog has never caused any damage or injury before.

Are There Any Defenses If My Animal Injures Someone?

This area of the law is unclear at this time. It is possible that you may not be held liable if someone else unchains your dobermans, or if the injured party was attempting to break up a dog fight. Also you may not be liable if the injured party was trespassing at the time -- for instance, if your guard dogs injure a trespasser and you have the proper warning signs posted.

Sources Of Information

Ask for the following publications:

- **Contract & Tort Law for Farmers**

  Available from:
  Publications Distribution Centre
  Manitoba Agriculture
  Room 805 - 401 York Avenue
  Winnipeg, Manitoba
  R3C 0P8 or phone 945-3846

  or your local agricultural office

Chapter 8
Security Contract Law

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Security Contract Law

What Is A Security Contract?

A security contract is an agreement under which property is pledged to a lender in return for credit. If the borrower fails to make payments to the lender as pledged in the agreement, a security contract gives the lender the right to repossess (seize) and sell the property named in the agreement. In this way, the lender is assured that the loan will be repaid. For example, if a bank gave you a loan to buy a tractor, in most cases, you would be asked to sign a security contract. If you fail to make the payments, the bank has a legal right to repossess your tractor and sell it as a way of recovering the debt. The bank's other option is to sue you in order to recover the debt.

What Types Of Security Contracts Are There?

There are a myriad of security contracts dealing with long-term, intermediate and short-term financing. New security contracts can always be created, but applicable legislation must be followed.

The major types of security contracts used in granting farm credit are:

- real property mortgages;
- chattel mortgages;
- general security agreements;
- inventory security agreements;
- Section 178 Bank Act security;
- conditional sales agreements;
- assignments of interest;
- personal guarantees.

While a real property mortgage is primarily used for long-term financing, the other types of security contracts are more common in intermediate and short-term financing. Personal guarantees are common for all terms of financing.

Real Property Mortgage

What Is A Real Property Mortgage?

A real property mortgage is a legal document giving a lender an interest in your land in exchange for a farm loan. You still remain the legal owner of the land, even though the lender has an interest in it.

What Are The Terms Of A Real Property Mortgage?

Most real property mortgages are standard forms used by the particular lending institution. The following terms must be included in the mortgage document:

- names of mortgagee(s) and mortgagor(s);
- description of land being mortgaged;
- specific or maximum amount of money being lent;
- amortization period;
- the schedule of payments with amounts;
- the amount of interest.

The document may include a wide variety of other terms. For example, it can state that you are responsible to pay for all taxes, or that you are not allowed to destroy or adversely alter the land in some way. Before you sign the document, you should read it carefully and ask the lending institution to explain any parts of the form you do not understand. If you require additional clarification, ask the lawyer who is executing the mortgage for an explanation of terms, conditions, rights, and obligations in the document.

If you anticipate paying off the mortgage before the term is completed, it is important to check and see whether you can do so, because certain lending institutions will not allow you to do this without severe penalties. If this is the case, ask to have the clause changed, or look for another lender. Most lending institutions do allow pre-payment, but they will penalize you in some way. Be sure to find out what that penalty will cost.

What Happens If I Don't Make Payments On A Real Property Mortgage?

If payments on your mortgage are not made, you are in "default" of the mortgage, and the lender has several options.

If he/she elects to **repossess your land by "foreclosure,"** he/she must first attempt to sell the land at a public auction. If there is money left after the debt and sale costs have been paid, you would receive any surplus funds. However, if the sale price is not going to be enough to the cover the mortgage and sale

costs, the lender will usually elect not to sell the property. Instead, the lender will ask a court for an order to get legal title to your land, and the land will then be transferred to the lender. This is foreclosure. Once this transfer is made, the lender owns the land and may sell it to recover the debt and cover costs. You will no longer have any rights to surplus proceeds, but your debt will be extinguished. At this point, the lender cannot sue you for the debt, since foreclosure completely discharges you from any obligations.

It is important to note that you can stop any sale of your land -- up to the point that title is transferred to the lender -- by paying any outstanding arrears and bringing the mortgage up to date. As well, the Family Farm Protection Act, through the Manitoba Mediation Board, prevents the sale or foreclosure of farm land until it reviews the situation and attempts to find a solution. (See Chapter 9.)

Another way the lender can recover the debt is to sue you. In this process, a full court procedure takes place and the lender asks the court to make a judgment directing you to repay the debt and any associated costs. However, the lender will first use a legal procedure called "examination in aid of execution" to try to find out if you have any property or money that can be used to repay the debt. After receiving a court judgment in his/her favour, the lender may attempt to recover the debt by forcing a sale of any properties of the borrower. The lender will start this process by filing a "Certificate of Judgment" in the land titles office. Normally, a lender must wait one year after the certificate is filed to force a sale of the property.

Another method for debt recovery of a real property mortgage is for the lender to ask a court to be allowed to **seize property other than your land**. If approved, this will be done by a sheriff's officer, and the lender will then auction it off to recover the debt owed for your land.

Chattel Mortgage

What Is A Chattel Mortgage?

A chattel mortgage is similar to a real property mortgage, except that it relates to movable property (chattels), rather than real property (land). The moveable property pledged as security for the loan is usually the item purchased with the loan, but you can sometimes use goods you already own as security. A chattel mortgage gives the lender the right to seize these pledged goods if you default on your loan. However, before this can happen, you have the right to pay off the debt and redeem the goods.

What Happens If I Default On Chattel Mortgage Payments?

The lender has several options if you default on payment: **seize the goods and sell them**; **sue you** in order to obtain a court judgment in his/her favour; **demand full payment of the loan.**

If the lender **seizes and sells the goods**, and if any costs have not been repaid after the sale, the lender can take you to court and ask for a court judgment for the remaining balance. This means you still owe that amount. However, if there is a surplus after the sale and repayment of the debt, it must go to you.

If the lender elects to take you to court and **sue you**, and receives a court judgment in his/her favour, there are many options open to him/her including asking the court to:

- force you to sell personal assets to cover the debt;
- request that you pay the debt from your savings;
- force you to sell other business assets (not covered in the mortgage).

If the lender demands **full payment of the loan**, and there is a clause in the agreement allowing for this (called "acceleration"), you will have to comply. However, the Consumer Protection Act places certain restrictions upon acceleration, and you must be given the chance to pay the arrears and the default charges in order to avoid it. You can then continue to make regular payments under the terms of the chattel mortgage.

Acceleration-upon-default clauses are valid in any security agreement, although the Consumer Protection Act provides you with the opportunity to redeem yourself and avoid full repayment.

General Security Agreement

What Is A General Security Agreement?

A general security agreement (GSA) is a very broad security contract, and often gives the lender a security interest in all of a person's assets -- including all future assets. For example, if you buy a tractor *after* you sign a GSA, it will still be part of the security.

Of particular note to farmers is that growing crops can also be included in the GSA. However, you can list specific assets in the document that you want excluded from a GSA. Personal necessities and the minimum of seed and implements should be excluded, so that there is some property left to make a new start in the event of serious financial difficulties.

Can I Sell Any Of My Assets Under A GSA?

Yes. However, the proceeds from the sale may become part of the security given to the lender, unless the lender expressly authorizes the sale in a written contract.

What Happens If I Default On GSA Payments?

Upon default, the lender has the right to demand full payment of the debt (acceleration). If this is not forthcoming, the lender can attempt to recover the debt by seizing the secured property, or by taking over the operation of all or part of the farm business. This can be done directly by the lender or by an appointed receiver.

The lender may also sue you in order to seek a court judgment ordering you to pay the outstanding debt.

Inventory Security Agreement

What Is An Inventory Security Agreement?

An inventory security agreement (ISA) is very similar to a general security agreement, except that it covers only the inventory assets on a farm -- livestock, growing crops, and crops in storage. A general security agreement can be used as an inventory security agreement if it excludes all assets other than farm inventory.

The ISA is commonly used by lenders to secure operating lines of credit. A similar security contract, the equipment security agreement (ESA), is used to secure loans for the purchase of equipment.

Can I Sell Any Of My Inventory Assets Under An ISA?

Yes. An ISA does not restrict the sale of inventory, but the proceeds from the sale may become part of the security given to the lender -- unless the lender expressly authorizes the sale in a written contract.

What Happens If I Default On ISA Payments?

The lender's rights to recover a debt under an ISA are the same as those under a general security agreement.

Section 178 Of The Bank Act

What Is A Security Agreement Under Section 178 Of The Bank Act?

Section 178 of the Bank Act allows chartered banks to make loans or advances to farmers in return for a security interest in farm inventory, equipment or machinery. The loans or advances can be made for the purchase or repair of agricultural implements, equipment, and buildings, for improvements, or for operating inputs.

Section 178 security gives a bank a security interest in the goods for which the loan was made, and in any other assets a farmer may agree to include. For example, if you borrowed money to purchase crop inputs, the bank would take a security interest in any crops grown from the inputs, and it might also ask for your tractor as security. With Section 178 security, you retain legal title and possession of the assets covered in the agreement.

A Section 178 agreement allows the specified security to be used against future advances, so that if the bank lends you more money in the future, it will already have security for those advances. In this way, the bank can set up a line of credit for you.

Can I Sell Any Of My Assets Under A Section 178 Agreement?

Yes. However, the proceeds from the sale may become part of the security given to the lender -- unless the lender expressly authorizes the sale in a written contract.

What If I Default On Payments Under A Section 178 Agreement?

Upon default, the bank can seize and sell the property listed in the agreement. It can also appoint an agent or receiver to complete, ship, or otherwise deal with this property, in order to recover its money. This might include harvesting the growing crop or caring for livestock covered under the security.

Conditional Sales Agreement

What Is A Conditional Sales Agreement?

A conditional sales agreement is a written agreement that allows you to purchase goods on credit while the seller provides financing for you. Possession and use of the goods is given to you, while legal title remains with the seller. You will obtain full ownership of the goods once they are paid for in full.

What Happens If I Default On Payments Under A Conditional Sales Agreement?

Upon default, the seller has two options: **the goods can either be seized and sold** or **you can be sued and a judgment can be obtained in court** for the balance owing. However, the Consumer Protection Act only allows the seller to use *one* of these options.

If the seller elects to **seize and sell the goods**, but discovers that the proceeds from the sale do not cover the debt, he/she *cannot* then sue the buyer for the balance owing. The seizure and sale will cancel the debt, and the buyer will no longer be under any obligation. (See "What Are My Rights When A Lender Tries To Seize Property?")

It should be noted that a seller of *new* equipment must apply to the Farm Machinery Board for permission to repossess it. The board will review the situation and make a decision on whether to allow the seller to proceed.

If the lender decides to take you to court and sue you, and then receives a court judgment in his/her favour, you will be ordered to pay. If you don't, the lender can:

- hire a collection agency;
- go back to court for permission to garnishee your wages, freeze your bank account, or to take any other action necessary to collect.

Assignment Of Interest

What Is An Assignment Of Interest?

An assignment of interest is a legal document that assigns a farmer's interest in an asset to a lender, in return for a farm loan or advance. This gives the lender the right to receive the money due to the farmer from that particular asset. For example, a farmer could assign part of the money from his/her milk sales in return for an operating loan.

An assignment of interest can be used to secure a revolving line of credit, for full payment of an outstanding mortgage balance, or for purchasing farm inputs or equipment. There are several common types of interest assigned by farmers to lenders:

- accounts receivable (book debts);
- mortgage;
- life insurance;
- crop insurance;
- warehouse receipts;
- payments due to milk producers.

Can I Sell Assets Under an Assignment Of Interest?

As with most security contracts, you may sell the assets, but the proceeds from the sale may become part of the security given to the lender -- unless the lender authorizes the sale.

What Happens If I Default On Payments Under An Assignment Of Interest?

Upon default, and depending upon the type of assignment of interest, a lender can usually repossess and sell any of the goods that are covered under the assignment. The lender can also sue you for any shortfall from the sale, in order to recover the debt.

Personal Guarantee

What Is A Personal Guarantee?

A personal guarantee is a security contract in which a third party (a guarantor) promises to repay all of, or a stated sum of, a borrower's debt to a lender should the borrower fail to repay it. A personal guarantee is often used for loans or advances to family farm corporations, young farmers, or borrowers having insufficient equity to secure a debt.

A personal guarantee can include all or a portion of a borrower's debts -- both those that exist now or are incurred in the future. It will also indicate the limit of the guarantor's liability, which can be for all of the borrower's debts or up to a specified maximum amount.

In some contracts, a guarantor promises not only to repay any of the borrower's debts to the maximum amount of the guarantee, but also any accrued interest from the date that repayment is demanded by the lender. A lender is under no obligation to collect from a borrower before requesting repayment from the guarantor.

If several people guarantee a borrower's debts, the guarantees are cumulative. For example, if two people guarantee a borrower's debts for $50,000 each, the total guarantees are $100,000.

Can I Sell Any Of My Assets Under A Personal Guarantee?

There are no restrictions on the sale of a guarantor's assets, even though you have personally guaranteed another person's debts.

What Happens To The Guarantor If The Borrower Defaults On Payments?

Upon default, the lender may give the guarantor notice of the borrower's default, and request that he/she repay the debt according to the terms of the personal guarantee. If the guarantor does not, the lender can sue him/her and obtain a court judgment for any shortfall of payments according to the terms of the guarantee.

Registering Security Contracts

Where Are Security Contracts Registered?

Just as land mortgages are registered at the Land Titles Office to allow interested parties to examine the documents and protect lenders' interests, security contracts on personal and moveable property are registered at the Personal Property Registry (PPR). In addition, banks register Section 178 contracts with the Bank of Canada.

Which Security Contracts Are Registered At The Bank Of Canada?

The Bank of Canada is a federal registry for security agreements regulated by the Bank Act, so security given to a bank under Section 178 of the Bank Act is registered here. The Bank of Canada is located at:

161 Portage Avenue
Winnipeg, Manitoba
R3B 0Y4
983-5530.

Who Can Conduct A Search At The Bank Of Canada?

Anyone can conduct a search to determine if security has been given by a borrower to a bank under section 178 of the Bank Act. Searches must be done in person at the Bank of Canada. The exact name, address and birthdate of the borrower must be provided, as well as a search fee of $2. For searches on corporations, the exact name and address of the corporation must be provided.

Which Security Contracts Are Registered At The Personal Property Registry?

The Personal Property Registry (PPR) is a provincial registry for all security contracts on personal property. Personal property registered under Section 178 of the Bank Act may also be registered at the PPR, if the bank so chooses. This registry is regulated by the Personal Property Security Act of Manitoba. The location of the PPR is:

15th Floor, Woodsworth Building
405 Broadway
Winnipeg, Manitoba
R3C 3L6
945-2388.

Who Can Conduct A Search At The Personal Property Registry?

Anyone can conduct a search to see if an asset has been pledged as security by a borrower to a lender, or to determine if claims have been registered against specific assets. Searches can be done over the telephone (if the searcher has an account with the registry), or in person. The exact name, address and birthdate of the borrower is required, or the exact name and address if the borrower is a corporation. For vehicles, only the motor vehicle serial number is required to perform a search for any registered claims against it. A $2 fee is charged for verbal reports; written reports cost $7.

Further information can be found in *Types of Security Contracts Available to Manitoba Farmers*, a Manitoba Agriculture publication.

Can Security Used In One Agreement Be Used In Another?

If you sign a security contract for one purpose, using specific property as security, that property cannot be used as security for another loan -- except for the value in excess of the amount required to discharge the earlier security.

What If I'm Asked To Sign More Than One Agreement?

Some chartered banks may ask you to sign a security agreement under Section 178 of the Bank Act, as well as a General Security Agreement, as security for a loan. This does not mean that the bank is getting double security on inventory assets; rather, it is better protecting its interest in the property pledged as security. Asking you to sign these two types of security agreements enables the bank to register its interest in your property at both the Bank of Canada and Manitoba's Personal Property Registry. In this way, it is ensuring that other lenders taking the same property as security are aware of its prior security interest in the property.

Other Types Of Farm Credit

Are There Other Types Of Farm Credit?

Two other methods of farm financing are used regularly and form a substantial part of total farm borrowings. They are **trade credit** and **credit based on promissory notes**. Neither method uses direct asset security, but they can be used in conjunction with the previously-discussed security contracts.

What Is Trade Credit?

Trade credit is a charge account based on the promise of payment from the sale of goods or services. For example, a farmer could buy fertilizer with the promise of payment at a future date (when the crop is sold).

What Happens If I Default On Payments Under Trade Credit?

Essentially, the seller has four options.

- **Debt Collection**

Since you have not given any security to the seller, seizure of your goods cannot take place without a court order. Instead, the seller can try to collect the debt. He/she can hire a collection agency to try to encourage you to pay the bill, but this agency is not allowed to seize your property or take legal action against you. As well, the Consumer Protection Act states that the debt collector may not use unfair collection practices, including:

- collecting an amount in excess of that actually owing;
- making "collect" telephone calls in order to demand payment;
- misleading you by using papers that look like legal documents;
- harassing you by making frequent telephone calls or personal visits;
- phoning or visiting before 7 a.m. or after 9 p.m.;
- phoning or visiting on a Sunday or holiday.

- **Garnishment**

The seller can go to court and obtain a garnishment order (also known as an "attachment"), which allows him/her to seize money through a third party. This party will then pay the money into court, and it will be forwarded to the seller. For example, your bank account could be garnisheed, forcing the bank to send the sum owed to the court. If the seller wants to garnishee your wages, forcing your employer to send part of your salary to the court, he/she must first sue you which means a full court procedure as opposed to a simple court order. A wage garnishment order is good for 30 days, and can only seize a maximum of 30% of

your wages. If you are without dependents, you must be left with at least $250 per month. If you have dependents, you must be left with at least $350 per month.

Any lender can obtain a garnishment order from a court for an outstanding debt; this method of collection is not restricted to lenders who have a trade credit agreement with you.

- **Suing**

The seller can sue you in court, which means a full court procedure in which he/she seeks judgment to recover the entire debt and related costs. If the ruling is in his/her favour, he/she can attempt to recover the entire amount (plus court costs) by a variety of methods, including going back to court and asking for:

- a garnishment order;
- orderly payment of debts (where the court draws up a payment schedule for your debts);
- permission to seize other assets to repay the debt.

- **Lien**

The seller can file a lien against you for not paying for services and/or materials. A lien allows the person providing the services or materials to register a claim in the Land Titles Office (for land) or at the Personal Security Registry (for chattels). In that way, other lenders (or buyers) will know about your debt, and you will not get clear title to the property until the debt is paid. For example, a garage keeper who has provided service to your vehicle has the right to file a lien against your vehicle, if you do not pay for the services. As well, contractors or sub-contractors who perform construction work for you can file a lien against your property if you fail to pay.

Liens generally grant the greatest amount of protection to a lender because the debt arising from a lien is payable before others, including secured debts that were registered after the lien.

What Is A Promissory Note?

A promissory note is a signed document containing a written promise to pay a certain sum of money to a specified person, either in fixed or regular payments, or on demand. A promissory note usually specifies a set rate of interest to be applied on outstanding balances.

Can I Sell Any Of My Assets Under A Promissory Note?

Under a promissory note, none of your assets have been pledged as security for the loan so you are free to sell as you wish.

What Happens If I Default On Payments Under A Promissory Note?

The procedures are the same as for trade credit. However, with promissory notes, **lenders will often ask for an additional agreement** that is secured by real or chattel property, thereby **allowing them to seize the goods used as security** if your promissory note payments are in default. If you have signed a security agreement in conjunction with a promissory note, **your lender has the right to seize property.**

What Are My Rights When A Lender Tries To Seize Property?

- Usually, only property listed as security in a security agreement can be seized, but there are some exceptions. Under a promissory note, where there is no security, the lender can obtain a court order to seize and auction off personal property. As well, under a land mortgage, the lender can obtain a court order to seize unsecured personal property and auction it off.
- A lender cannot seize real or chattel property without a court order if you owe less than 25 per cent of the total amount of the original loan.
- Property cannot be seized unless you or another adult member of the family is present and aware of the seizure.
- Property can only be seized between 7:00 a.m. and 9:00 p.m., and cannot be seized on Sundays or holidays.
- The lender or collection agent must leave the premises if ordered to do so, and must then obtain a court order for seizure.
- The lender cannot seize property if the borrower has a claim against the lender. The claim must be settled first.
- The lender or collection agent cannot harass you to get payment.
- Within 48 hours of seizure (not including Saturday, Sunday and holidays), the lender must notify you that your property has been seized. This written notice must include the date of seizure, the amount to be paid to get the property back, how that amount is calculated, the date by which the property must be claimed, and where the property is being stored.
- You have 20 days to get the property back by paying arrears and costs of storage.
- If you feel your rights have been violated by the seizure of the property, contact the Consumers Bureau (toll free 1-800-782-0067). The staff there can assist you in filing a court claim for return of your property, if necessary.

What If A Lender Sues Me In Small Claims Court?

If your debt is under $5,000 and does not involve title to land, a lender will usually elect to sue you in Small Claims Court (of the Court of Queen's Bench), because this is often an inexpensive and effective way to obtain a court judgment against you. You will be served with a claim filed by the seller, outlining what is being claimed and when to appear in court. Then, both you and the lender present your cases to a "hearing officer," who rules on the case. Following a Small Claims Court decision in the lender's favour, the lender can use a collection agency, file a lien, and/or obtain a garnishment order to try and collect the debt. (See "Trade Credit") If the lender wants to garnishee your wages, he/she must take you back to court and receive a ruling to do so.

It should be noted that if you choose not to appear in Small Claims Court when called, a judgment will be granted in favour of the other party -- providing proper procedure has been followed by the lender.

If you disagree with a Small Claims Court ruling, a Notice of Objection and Defense must be filed within 16 days after the ruling is made against you. In this case, the trial would be heard by a Court of Queen's Bench judge.

The Most Important Thing To Remember About Security Agreements

Considering the importance of credit to any farming operation, it is of primary importance to read, understand and be in agreement with any security agreement you are asked to sign. If in doubt, consult a lawyer or other knowledgeable professional *before* you sign the document. If you don't understand something, be sure and ask! Remember, do not sign a document -- until you have read and understood *all* the clauses in it!

It is also important to remember that you need to provide **only** the amount of security necessary for the loan you wish to secure. Otherwise, you will have no security left for additional loans.

Sources Of Information

Ask for the following publications:

- **Knowing Your Legal Rights: The Law and Farm Credit**
- **Coping With Financial Difficulties**
- **Sources of Credit for Manitoba Farmers**
- **Types of Security Contracts Available to Manitoba Farmers**

  Available from:

  Publications Distribution Centre
  Manitoba Agriculture
  Room 805 - 401 York Avenue
  Winnipeg, Manitoba
  R3C 0P8 or phone 945-3846

  or your local agricultural office

- **Understanding the Law: Credit and Debt**

  Available from:

  Community Legal Education Association
  202 - 379 Broadway
  Winnipeg, Manitoba
  R3C 3N9

- **Consumer Protection Act**

  Available from:

  Statutory Publications
  Culture, Heritage & Recreation
  Manitoba Archives Building
  200 Vaughan Street
  Winnipeg, Manitoba
  R3C 1T5
  phone: 945-3501

Chapter 9
Bankruptcy And Foreclosure Procedures

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Facing Financial Difficulties

What If I Am Facing Financial Difficulties?

The importance of credit to a farming operation is significant, and therefore, farmers have become particularly vulnerable to financial troubles. If you are facing financial difficulties, you should immediately seek help from a professional -- either a lawyer, an accountant, a financial advisor, a farm management specialist, or an agricultural representative. Financial difficulties do not simply go away, but instead, they may become more troublesome as time goes on. Therefore, at the first indication that you might not be able to meet a loan payment, call the professional you feel might best help you.

Bankruptcy

What Is Bankruptcy?

Bankruptcy is a legal process governed by federal legislation, known as The Bankruptcy Act. It provides immediate relief to an overburdened debtor by halting the legal actions of creditors.

The Bankruptcy Act performs three tasks:

- It establishes a uniform practice in bankruptcy proceedings throughout the country, at the least expense possible.
- It provides for a fair distribution of assets amongst creditors.
- It releases an honest but unfortunate debtor from his/her obligations, thus permitting the debtor to resume business activities with a clean slate.

To Whom Does The Bankruptcy Act Apply?

It applies to any "person" (individual), corporation, or individuals in a partnership.

How Does The Bankruptcy Process Begin?

If a person is engaged *solely* in farming, he or she must voluntarily apply for bankruptcy to Consumer and Corporate Affairs Canada. Once this is done, a licensed trustee will be appointed, and all of the person's debts will be "assigned" (handed over) to the trustee.

Non-farmers, and farmers who are *not* engaged solely in farming, can be "petitioned" into bankruptcy. This means that a creditor can petition a court into assigning the debtor's assets to a trustee. However, the claim of the creditor(s) must exceed $1,000. As well, the debtor must have committed "an act of bankruptcy" within the last six months. This includes:

- fraudulently transferring assets to a person other than a trustee to prevent a creditor from getting the property;
- creating a "fraudulent" preference, which is the settling of a claim with one creditor in preference to that of another;
- attempting to hide, delay or defeat creditors;
- failing to pay the arrears on property that a seller has repossessed;
- exhibiting a statement of assets and liabilities that shows insolvency, or making a written statement of inability to pay debts;
- attempting to remove or hide property;
- giving notice to creditor(s) of suspension of debt payments;
- defaulting under a proposal made under the Bankruptcy Act;

- ceasing to meet liabilities as they become due;
- assigning assets to a trustee for the benefit of creditors.

Once a person voluntarily applies for bankruptcy, or is petitioned into it, he/she cannot be sued by unsecured creditors. They must all apply through the trustee. However, *secured* creditors (those that have taken assets for security on a loan) can seize any property pledged to them -- but not until the trustee has had time to determine if their claims are valid. In addition, secured creditors must abide by The Farm Debt Review and The Family Farm Protection Acts (discussed later in this Chapter).

What Happens After Property Is Transferred To The Trustee?

The trustee will work with the debtor in order to present a repayment proposal to the creditors. If all creditors agree, and a court agrees, the assets are transferred back to the debtor and he/she will begin repayment.

However, if the creditors do not agree to the proposal, the debtor becomes legally bankrupt. The trustee will sell the assets in order to pay off the creditors. The Bankruptcy Act provides a distribution scheme that gives priority to secured creditors, and then to "preferred" creditors in the following order:

- those with claims for funeral expenses;
- trustee's fees/expenses;
- creditors with claims for legal costs;
- employees with wage claims;
- municipality(ies) with tax claims;
- landlord(s) with rent claims;
- claims of injured employees;
- claims from governments.

If there is money left, the trustee will distribute it to any other unsecured creditors.

Are Any Assets Exempt From Transfer To The Trustee?

Yes. The Executions Act and the Judgments Act list property that is exempt from transfer to a licensed trustee. However, these exemptions only apply to *unsecured* property. If you have given any property as security for a loan, it can still be seized by the secured creditor, although it will not transfer to the trustee. Since exemptions are designed to provide the necessities of survival for an individual, they are not available to a corporate debtor.

A summary of the exceptions includes:

- the bed and bedding of the debtor and his/her family;
- household furniture and effects not exceeding $4,500;

- clothing of the debtor and his/her family;
- professional books, tools, implements, and other necessities used by the debtor in the earning of his/her living to the value of $7,500;
- a vehicle used for employment;
- food and fuel for the debtor and his/her family, or cost of food and fuel for six months;
- all animals, farm machinery, equipment, and dairy utensils required for the debtor's agricultural operations on 65 hectares (160 acres) for the next 12 months;
- one vehicle if needed for the farm operation;
- the seed grains required to seed all of the debtor's land under cultivation;
- medical aids required by the debtor such as hearing aids, crutches and wheel chairs;
- one year stay of execution for ordinary homes and mobile homes;
- $2,500 equity in residential property not held in joint tenancy, and $1,500 equity for each tenant in residential property held in joint tenancy.

How Is Bankruptcy Completed?

The final step in the bankruptcy process is the application to a court for a "discharge." In most cases, this application is made automatically upon voluntary assignment.

A hearing considering this application must be held by the court within one year of the debtor's assets being assigned to the trustee. At the hearing, the trustee will present a report on the cause of the bankruptcy and the debtor's conduct before and during. The court can grant one of the following types of discharges: **absolute, conditional** or **suspended**, or it can **refuse to discharge**.

Absolute Discharge

An absolute discharge releases the debtor from all the debts incurred before bankruptcy.

Conditional Discharge

A conditional discharge places some obligations upon the debtor before the discharge becomes absolute.

Suspended Discharge

A suspended discharge does not become effective until a specified date, which is set by the court. Until that date, the debtor must abide by the rules and duties set out in the Bankruptcy Act.

Refusal To Discharge

In rare circumstances, the court may refuse to grant a discharge. In this case, the person remains bankrupt.

It should be noted that some debts are exempt from discharge. In other words, a person is still responsible for paying these debts. They include:

- fine or penalty imposed by a court;
- debt for alimony;
- debt under a maintenance order or agreement;
- debt arising from fraud;
- debt for obtaining property by false pretences;
- debt for the necessities of life.

What Is The Effect Of A Bankruptcy Discharge?

The discharge of a bankrupt debtor allows him or her to resume business activities with a clean slate. The debtor can own property and apply for credit, and is no longer responsible for previous debts (except those listed previously). However, the bankruptcy is recorded in his/her personal credit record, and it may be difficult to obtain credit in the future unless he/she can demonstrate the ability to repay debts.

What Are The Duties Of A Bankrupt Debtor?

According to the Bankruptcy Act, a bankrupt debtor must:

- reveal openly all financial information;
- attend an examination under oath by the Official Receiver to explain his/her conduct, the cause of the bankruptcy, and the disposition of the property;
- provide a sworn statement of affairs to the trustee -- including a list of assets and liabilities, the names and addresses of all creditors, and the security held by them;
- attend the first meeting of creditors;
- attend any other meetings or examinations as required;
- reveal to the trustee any assets that are acquired after the assignment in bankruptcy and before discharge.

What Actions Are Considered As Bankruptcy Offenses?

The Bankruptcy Act outlines the following conduct to be considered an offense(s):

- fraudulent disposition of property before or after bankruptcy;
- failure to perform any of the duties defined in the Bankruptcy Act;
- giving false answers at any of the inquiries;
- altering or destroying records;
- obtaining credit or property by false representation before or after bankruptcy;

- engaging in business without revealing that he/she is not discharged from bankruptcy;
- obtaining credit of $500 or more (not for necessities of life) without revealing that he or she is bankrupt.

Any of the above act(s) could result in a fine or jail term.

What Is Insolvency And How Does It Differ From Bankruptcy?

Generally, if you are insolvent, you are unable to meet your debts as they become due. Even though you are insolvent, you may not be bankrupt because bankruptcy occurs only after following the legal procedure outlined on the previous pages. "Insolvency" describes a financial situation, but "bankruptcy" describes a legal state governed by the Bankruptcy Act.

What Is Receivership And How Does It Differ From Bankruptcy?

Receivership is when *secured* creditors appoint a "receiver-manager" to take control of the management of a debtor's farm because they have lost confidence in the debtor's ability to do so. The receiver-general insures that the secured creditor(s) is satisfied. This process is entirely governed by provincial legislation and the common law, and is usually applied to corporations or businesses. Under the Family Farm Protection Act, a secured creditor must obtain permission from a court before appointing a receiver (see Chapter 8).

Bankruptcy, on the other hand, is usually used by unsecured creditors -- although it can be used by both. It is when a debtor's property is sold and proceeds distributed to creditors in an orderly fashion in order to satisfy his/her debts. Quite often it applies to individuals. It is governed entirely by federal legislation (The Bankruptcy Act).

Foreclosure

What Is Foreclosure?

Foreclosure is a legal action available to a "secured" lender, in which the lender takes title to a property in order to recover an outstanding debt. Foreclosure can be used for a real property (land) mortgage and for a chattel mortgage (personal property such as equipment, vehicles, etc.), but only for debts in which the borrower has used land or property as security.

Once the property title passes to the lender, the property will be sold in order to recover the loan.

Foreclosure is usually a last resort for most lenders because it is a lengthy process that must involve a court of law.

What Are The Steps In Foreclosure?

The steps in foreclosure are **different** for a **real property mortgage** and for a **personal property (chattel) mortgage.**

What Are The Steps In Foreclosure Under A Chattel Mortgage?

- According to the Manitoba Personal Property Security Act, a lender that holds a chattel mortgage is entitled to send a notice requesting full payment of the outstanding debt to a borrower that is in default. This notice can be sent at any time after the borrower misses a payment.
- If the borrower is a farmer, he/she has 15 working days to contact the **Federal Farm Debt Review Board.**
- The Farm Debt Review Board will then review the situation and will try to arrange for a new payment schedule that satisfies both lender and borrower. The board has up to 120 days to do so.
- If an agreement cannot be reached, the lender will go to court and ask for title to the mortgaged property or any other property that was used as security. If this request is approved, the title to the property will be transferred from the borrower to the lender. The borrower will no longer have any interest in the property.
- The lender will then sell the property in order to recover the loan.

If the personal property involved is new farm machinery or equipment, financed on a lien note, it is covered under the Farm Machinery and Equipment Act. If you default under a lien, the lien holder must apply to the Farm Machinery Board for approval to repossess (see Chapter 5).

What Are The Steps In Foreclosure Under A Real Property Mortgage?

- Once a farmer has been in default of a real property mortgage agreement for one month, the lender can send a "notice of default" to him/her that identifies the amounts still owing and the time in which he/she has to repay it. A copy of this notice is also sent to the Land Titles Office.
- If the farmer is still in default one more month later, the lender can apply to the Court of Queen's Bench under the **Family Farm Protection Act**, for permission to recover the debt. A copy must also be sent to the Manitoba Mediation Board.
- The Manitoba Mediation Board, which enforces the Family Farm Protection Act, will perform a review and attempt to arrange a solution (discussed on the next few pages).
- If a solution is not possible, the lender applies for and receives a court order permitting action. The lender will then apply to the District Registrar of the Land Titles Office for an "Order to Sell" the land.
- If an Order to Sell is granted, the land is put up for sale. The lender must try to sell it, and attempt to recover the full mortgage amount and the cost of selling. If there is any extra money, the farmer is entitled to it, and his/her debt is then extinguished.
- If the lender tries to sell the land and a shortfall is anticipated, an application for an "Order of Foreclosure" can be made -- providing six months have passed since the original default.
- Once an Order of Foreclosure is granted, all legal interests in the property and title to the property, pass to the lender. The farmer's debt is now extinguished.

What Is The Family Farm Protection Act?

The Family Farm Protection Act says that any request from a lender to the District Registrar for an **Order to Sell** or **Order to Foreclose** on a farmer's land must also be forwarded to the Manitoba Mediation Board -- within 15 days. So must any request to sue the farmer in the Court of Queen's Bench. The Manitoba Mediation Board (MMB) is the body that enforces the Family Farm Protection Act.

The MMB then has 90 days to review the case -- including all aspects of the borrower's farming operation. It must present a report to the Court of Queen's Bench that evaluates the farm and the farmer's abilities, and suggest solutions.

The Court of Queen's Bench will then hold a hearing, and will notify the farmer at least 15 days prior to it. The court can then take one of three courses of action:

- grant the request for sale and foreclosure (if applicable);
- order other appropriate action;
- adjourn the hearing on the grounds that the lender's request is unfair.

What Is The Farm Debt Review Act?

Under the Farm Debt Review Act, a Farm Debt Review Board is established in each province to ensure that farmers in financial difficult have access to an impartial third-party review and possible re-financing.

Unlike the Family Farm Protection Act, which makes it mandatory for lenders to notify it before taking any action, the Farm Debt Review Board (FDRB) puts the onus on the farmer. He/she has 15 working days to notify the FDRB of any notice of action on a loan default issued by a lender. The lender is not entitled to take action during these 15 days.

Once a farmer applies to the Farm Debt Review Board for help, it will order that all proceedings against him/her be stopped for up to 120 days. During that time, it will examine his/her financial affairs, offer advice, and negotiate with the creditor. It will even help the farmer and the lender draw up a new repayment schedule.

If an agreement can be reached, a legal contract is then signed by both the farmer and the creditor.

How Do The FDRB And The MMB Differ?

- The Farm Debt Review Board is a federal body that administers the federal Farm Debt Review Act. The Manitoba Mediation Board is a provincial body that enforces the provincial Family Farm Protection Act.
- Unlike the Manitoba Mediation Board, the Farm Debt Review Board does not have legal authority to force an agreement. Its role is to bring farmers and creditors together in order to reach their own agreements, while the MMB's role is to make recommendations that will be legally binding.
- Seeking the assistance of the FDRB is voluntary on a farmer's part, while intervention of the MMB is mandatory.

What Is The Difference Between Receivership And Foreclosure?

If a lender decides to put a property into receivership, a person will be appointed by a court to be a "receiver-manager." The receiver-manager then takes over the management of the property that has been pledged as security in the mortgage agreement. The lender that chooses this action is usually afraid the property will diminish in value while a lengthy court action (foreclosure) is pending.

Receivership takes over the management of the property, while foreclosure takes the property and all legal interests attached to it (including the right to possession and ownership of the land). Because the receiver-manager oversees the property only to assure that the debt to the lender can be repaid, whenever enough income has been generated to repay the debt, the property will be returned to the farmer. In foreclosure, once a lender has repossessed the property, the farmer loses his/her rights to it. In that way, the debt against the property is eliminated. The most significant difference between receivership and foreclosure, is that under receivership, ownership of the property remains with the farmer; in foreclosure, ownership, with all its rights, is transferred to the lender.

How Can I Prevent Foreclosure?

The most obvious way to prevent foreclosure is to bring your mortgage payments up to date, and pay any costs you owe the lender. This is called "redeeming" your mortgage, and you are allowed to do so within the time indicated in the foreclosure notice sent to you by your lender.

If you are unable to redeem your mortgage, you may be able to negotiate with your lender to reschedule your debt over a longer period, to provide additional security, or make a partial payment. Depending on the situation, most lenders will be open to negotiations that would lead to eventual repayment, rather than go through the long process of foreclosure that results in ownership.

Another option to prevent foreclosure is refinancing with another lender -- that is, borrowing from another lender to pay off the outstanding debt with the first lender. This will provide you with reasonable opportunity to repay the outstanding debt over a longer time period.

Sources Of Information

Ask for the following publications:

- **Coping With Financial Difficulties**
- **Knowing Your Legal Rights: The Law and Farm Credit**

  Available from:

  Publications Distribution Centre
  Manitoba Agriculture
  Room 805 - 401 York Avenue
  Winnipeg, Manitoba
  R3C 0P8 or phone 945-3846

  or your local agricultural office

- **Understanding The Law: Credit and Debt**

  Available from:

  Community Legal Education Association,
  202 - 379 Broadway Avenue
  Winnipeg, Manitoba
  phone 943-2382

  Or Contact:

  The Manitoba Mediation Board
  600 - 491 Portage Avenue
  Winnipeg, Manitoba
  phone: 945-0357

  The Farm Debt Review Board
  207 Notre Dame Avenue
  Winnipeg, Manitoba
  phone: 983-8621

  Consumer and Corporate Affairs
  Bankruptcy
  203-260 St. Mary Avenue
  Winnipeg, Manitoba
  R3C 0M6
  phone: 983-3229

Chapter 10
Income Tax Rules

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Income Tax Rules

Where Do I Start?

Income tax law is a complex area that is constantly undergoing change. There are a variety of sources of information on income tax -- accountants, lawyers, and farm management specialists. This chapter is intended to outline the basics of filing an income tax return. Information on more specific tax filing or tax planning issues may be obtained from the above sources, or by consulting the *Farming Income Tax Guide* from Revenue Canada Taxation, or publications from accounting firms and tax consultants. As well, Chapter 11 covers estate tax planning issues.

Who Needs To File An Income Tax Return?

The Canadian income tax system is based on self-assessment. You must file a return if you:

- owe income tax for that year;
- received a child tax credit pre-payment;
- must pay Canada Pension Plan contributions because you have self-employed earnings;
- disposed of capital property or had a taxable capital gain;
- have a basic herd established;
- plan to include the income or loss for the year in block averaging;
- receive a demand to file from Revenue Canada;
- must repay part of your Family Allowance or Old Age Security benefits;
- claim a provincial tax credit;
- claim a refund on investment tax credit;
- claim a refund for overpayment of Canada Pension Plan or Unemployment Insurance premiums;
- eligible to claim the goods and services tax credit;
- claim a federal sales tax credit;
- eligible to participate in the Net Income Stabilization Account (NISA).

What Does Revenue Canada Consider To Be "Farming"?

The Income Tax Act does not specifically define farming, or set a limit on the activities that will be included under the definition. However, it does specifically include the following activities under the definition of farming:

- tillage of the soil;
- livestock raising or exhibiting;
- maintaining horses for racing;
- raising poultry;
- fur farming;

- dairy farming;
- fruit growing;
- keeping bees;
- raising Christmas trees;
- operating nurseries and greenhouses;
- operating wild game reserves;
- raising race horses for resale;
- operating certain feedlot operations;
- operating chick hatcheries;
- market gardening.

However, even if a person is engaged in any of the preceding "farming" activities, this does not guarantee that Revenue Canada will classify these activities as a "farm business." To be classified as a farm business, you must have a reasonable expectation of profit from farming. In deciding if a farmer has a reasonable expectation of profit, Revenue Canada looks at the profit and loss experience in past years, his/her training, the intended course of action (does he/she intend to establish a viable farm business?), and the capacity of the farm to show a profit after capital cost allowances. If the farm does not meet these criteria, it is considered a "hobby farm" and any farming losses are not deductible against income from other sources.

What Are The Methods Of Reporting Income?

There are two basic methods that farmers can choose to report income -- "cash" or "accrual." Under the **cash method**, you report income in the year it is received and deduct expenses in the year they are paid. You should note that in the cash method, post-dated cheques accepted as payment of debts are considered income at the time they are received -- *not* when they are cashed.

Under the **accrual method**, you report all income in the fiscal period in which it is earned (no matter when you actually receive payment), and deduct expenses in the fiscal period in which they were incurred (whether or not you actually paid for them in that period). Complete inventories of livestock, crops, feed, fertilizer, etc. must be included.

For consistency, the same reporting method should be used from year to year. However, it is possible to change methods. To change **from the accrual method to the cash method**, you simply file your tax return using the cash method, indicating changeover adjustments to income and expenses. To change **from the cash method to the accrual method**, you must obtain permission from Revenue Canada. You can do this by sending your request and the reasons for the change

to the director of the district taxation office in Winnipeg. Upon receiving permission, you file your tax return using the accrual method, indicating changeover adjustments to income and expenses.

What Fiscal Period Can I Use?

Non-farming individuals -- unless they are self-employed -- must file income tax returns based on the calendar year, but as a farmer, you do not have to report income from farming on a calendar basis. You must report farming income in the taxation year in which your fiscal period ends. For example, farming income for the April 1, 1989 to March 31, 1990 fiscal period is reported in the 1991 taxation year. Choosing a fiscal year-end after most of the expenses have been paid, but before most of the income has been received, can defer tax payable on that income for a year. This is usually effective for the first year only, as income and expenses should "even out" over time.

To change your fiscal period, you must obtain permission from the director of the district taxation office. A change will not be allowed simply to minimize taxes.

What Type Of Records Should I Keep?

You must keep a record of all your business transactions during the year, in order to determine your profit or loss. A columnar book with separate pages for income and expenses is suitable, but any good accounting system is acceptable. The minimum requirement is a day-to-day record of your receipts and expenses, kept with duplicate deposit slips, bank statements and cancelled cheques. If you do not provide support for your expenses, Revenue Canada may reduce the expenses claimed.

You must also keep a separate and permanent record of assets on which you may want to claim capital cost allowance. The record should show from whom the asset was acquired, its cost, and the date of purchase. When an asset is sold or traded, the record should show date of disposal and the amount received or allowed on trade.

Business records and supporting documents must be kept for as long as you farm. Revenue Canada has up to three years to re-assess or audit your return, and if you are found in breach of income tax laws, it can go as far back in your records as it deems necessary. Before you destroy any of your records, you must obtain permission from your district taxation office.

What Forms Do I Need As An Individual Farmer?

Besides the **T1 GENERAL form**, an individual farmer may need several other forms to file a tax return that includes income from farming:

- **Form T1A** - Request for Loss Carry-Back;
  This form must be used when you want to apply losses in the current year against income claimed for previous years.
- **Form T2011** - Election to Average Income (Five-Year Block Averaging);
  This form must be used if you want to use the five-year block averaging provision to "smooth out" your farm income. The block averaging provision cannot be used by corporations and is not available after 1991 for any taxpayer.
- **Form T2038** - Investment Tax Credit (Individuals);
  This form must be used if you acquired property that is eligible for an investment tax credit in the taxation year, or if you are claiming an investment tax credit carried forward from a previous year.
- **Form T2041** - Capital Cost Allowance Schedule for Farmers and Fishermen;
  This form must be used if you are claiming a capital cost allowance as a farming expense.
- **Form T2042** - Statement of Farming Income and Expenses.
  This form must be used if you are claiming income from farming in your tax return.

What Forms Do I Need As A Partner?

If you are a member of a farming partnership with more than five members, you may need all or some of the forms listed for an individual farmer. As well, you *must* file a Partnership Information Return, using form **T5013 Supplementary -- Statement of Partnership Income.**

What Forms Does Our Family Farm Corporation Need?

A family farm corporation must file its income tax return using the following forms (where applicable):

- **Form T2 -- Corporation Income Tax Return;**
- **Form T2A -- Request for Corporation Loss Carry-Back;**
- **Form T2S(3) -- Schedule of Dividends Received and Taxable Dividends Paid;**
- **Form T2S(8) -- Capital Cost Allowance (Federal);**
- **Form T800 -- Manitoba Corporate Tax Reduction for New Small Businesses.**

What Happens After My Return Is Filed?

When your return is initially processed, only a very limited review of the information provided is done, and you are sent a notice of assessment that is based on the business income you report. But remember, Revenue Canada has up to three years from the date of your notice of assessment to review your return and add additional taxes, interest or penalties.

A notice of assessment may be appealed by filing a notice of objection (Form T400A) with the deputy minister of taxation, National Revenue, in Ottawa. You must describe your objection and the reasons for it, and file it within 90 days of the date the assessment was mailed to you. Your assessment is then reconsidered, and confirmed or changed. While there is no requirement to pay disputed taxes when they are under review, they are subject to normal interest charges.

If the objection is not allowed, you can appeal to the Tax Court of Canada within 90 days of the date formal notification of the ruling was mailed to you.

What Happens If My Income Taxes Are Not Paid?

If you owe income taxes, you must file your tax return prior to April 30 following the tax year. For a corporation, the filing deadline is six months from the fiscal year-end. If you do not file your tax return on time and you owe income taxes, you must pay a late-filing penalty based on the unpaid balance. Also, you must pay interest on unpaid income tax, on penalties, and on late tax instalments at a "prescribed rate," which is compounded daily.

If you try to avoid paying income taxes that are owed, and you are caught, you will, at the very least, be required to pay the taxes you owe. In addition to penalties and interest charges, further penalties -- including fines and/or prison terms -- may be imposed on you for not filing a return or filing a false return.

Sources Of Information

Ask for the following publications:

- **Farming Income Tax Guide**

  Available from:

  District Taxation Centre
  Revenue Canada Taxation
  391 York Avenue
  Winnipeg, Manitoba

- **Tax Management Strategies for Canadian Farmers**
  by Deloitte Haskins & Sells or Alberta Agriculture

  Available from:

  Deloitte & Touche
  2000 - 360 Main Street
  Winnipeg, Manitoba
  R3C 3Z3
  or
  Alberta Agriculture
  Farm Business Management Branch
  Box 2000
  Olds, Alberta
  T0M 1P0

Chapter 11
Tax Rules That Affect Estate And Tax Planning

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Estate And Tax Planning

What Is Estate Planning?

Estate planning deals with the orderly arrangement and disposition of your property. It can focus on transactions that occur during your lifetime, after death, or a combination of both. Estate planning is a complex area of the law, and requires knowledge of income tax, business, succession, insurance, and property law. It may involve the co-operation and assistance of a lawyer, accountant, insurance underwriter, farm management expert, and investment counsellor.

The ultimate goals of your planning will depend upon your individual needs. However, estate planning for farmers usually includes objectives that are similar to those of other business people. These include preserving the estate through tax planning, transferring assets to others, and planning for retirement.

What Is Tax Planning?

An important element of estate planning is to create a tax plan. A more detailed discussion is provided in *Tax Management Strategies for Canadian Farmers* (1989 edition). However, you first need to decide on your goals. Do you simply wish to maximize your "take-home" income? Are you planning to leave the farm to your spouse, or to your children? How will you provide for your retirement income?

Tax planning includes the **deferral** of tax (delaying *when* it is paid) and the **saving** of tax (*reducing* the amount paid). Tax planning is particularly important when it comes to transferring your farm. The tools you use to defer and save tax from your farm transfer will depend upon income tax laws at the time of transfer, as well as the type of business arrangements you are in.

Are There Special Tax Rules For Farmers?

Farmers can take advantage of several special rules that can be used to minimize and defer taxes on an ongoing basis, and in farm transfers. However, to be able to use these special rules you first need to meet the definition of "farming" in the Income Tax Act -- outlined in Chapter 10.

If you do meet the requirements to be considered a farmer, you are allowed to:

- smooth out your income through the use of the cash method of accounting, and optional inventory adjustment, as well as five-year block averaging until 1992;
- deduct farm expenses from farm income, and deduct farm losses from other income;

- take advantage of a $500,000 capital gain exemption on the sale of "qualified farm property";
- rollover farm property to your spouse and/or children.

What Is Income Levelling?

Income levelling is a form of tax deferral that evens out income over a period of years. It is beneficial to taxpayers to report even levels of income from year to year because individual tax rates are based on a progressive scale. The more income reported in any one year, the greater the percentage that is paid in taxes.

Farmers could be penalized by this system because of the cyclical nature of the agriculture industry, where incomes can often fluctuate considerably from one year to the next. Therefore, farmers have been allowed to average their income under special rules designed to give tax relief. Briefly, these rules include:

- using the cash basis for determining income. This means that revenues are included as income when they are received, and expenses are deducted when they are paid.
- allowing inventory owned at the end of the year to be included as income. This amount could be deducted from income for the following year.
- allowing income reduction by excluding the value of the basic herd (livestock owned prior to 1972) from income.
- using five-year block averaging. This means that you can choose to average your income over five-year periods, thereby offsetting profits from one year with the losses from another. (The last taxation year where the five-year block average can be used is 1991.)

When Can Farming Losses Be Deducted From Other Income?

If the farm provides the bulk of your income, or if it is the centre of your work routine, you are considered to be a "full-time" farmer and can deduct all farm cash losses from other income. Even if you have off-farm employment, you are still considered a "full-time" farmer -- if you devote more hours to farming than to your other employment and invest savings in the farm operation.

If your chief source of income comes from a combination of the farm *and* some other source of income, you are considered to be a "part-time" farmer. For part-time farmers, the amount of farm cash losses that can be deducted against other income is restricted to $8,750 (1991 figure).

What Is Capital Gains Tax?

Capital property usually includes farm land, buildings, machinery, equipment, vehicles, and property used for personal purposes (such as boats and summer cottages). Since 1971, if the money you make from selling capital property is

greater than the "original" price you paid for the property, a large portion of this gain is taxable. If a property was acquired prior to December 31, 1971, the "original" cost is usually considered to be its fair market value as of that date.

When capital property transfers at an amount less than fair market value, such as in the case of a gift, Revenue Canada "deems" the transfer to have been made at fair market value. If the fair market value exceeds the original cost, Revenue Canada will assume the transferor has incurred a capital gain -- *even if the capital property was a gift*. The person who gifted the land could actually pay income tax on the gift!

How Can I Avoid Capital Gains Tax?

Farmers can utilize two Income Tax Act provisions to avoid paying tax on capital gains when selling farm capital property -- the **$500,000 Capital Gains Exemption** and the **Family Farm Rollover Provision**.

The $500,000 Capital Gains Exemption

This applies to any transfer of farm capital property. In effect, it means you may eliminate an amount equivalent to the taxable capital gain incurred in a farm transfer (up to the $500,000 maximum). (For further information on the $500,000 Capital Gains Exemption, see *1990 Capital Gains Tax Guide*, available from Revenue Canada Taxation, Winnipeg.

In addition, there is a provision in the Income Tax Act that allows the "principal residence" -- the farm home -- to be exempted from capital gains tax. When you dispose of farm land, including the property that is your principal residence, this portion of the transaction can be excluded from the calculation of capital gains tax.

The Family Farm Rollover

This is a provision that can be used to postpone income tax on capital gains when transferring the family farm to children. It defers the tax to the next generation, therefore making your retirement plans and the business plans of your children very important. For example, if you wish to leave your farm property to your child, a member of the family must be actively engaged in farming the property immediately before the transfer. Otherwise, the rollover provision cannot be used to postpone capital gains tax on the transfer of land directly to the child. Instead, you could transfer it in a spousal trust, and then rollover at less than fair market value to the child(ren).

A spousal trust type of rollover requires only that the property be used in the business of farming (by anyone) immediately before the death of the first spouse.

So, if you retire and rent out your land to a non-family member, you will have to leave your farm property to your spouse's trust when you die, and then to the child upon the death of your spouse.

A rollover can occur under several situations:

- when any capital property is transferred from an individual to a spouse or to a spousal trust;
- when farm land and depreciable property used in the business of farming by the farm family are transferred from an individual to a child;
- when any property is transferred to a partnership;
- when any property, other than land owned by a non-resident, is transferred to a corporation;
- when a share in a family farm corporation or an interest in a family farm partnership is transferred to a child;
- when a share in a small business corporation is transferred to a child;
- when a quota is transferred to a child;
- when any property received by a child on a rollover is transferred to a parent as a result of the child's death.

Are There Other Ways To Save/Defer Taxes?

In addition to the special rules already discussed, there is another method of saving and deferring taxes for farmers called "income splitting." The principle behind it is that the same amount of income will be subject to more tax if it is earned by one person, than if it is split equally between two.

However, there are restrictions called "income attribution" rules, on income splitting in the Income Tax Act. Revenue Canada will sometimes "attribute" one family member's income to another, and tax it accordingly. For example, if you, as a farmer, transfer property (by sale or gift) to a spouse or to a child under the age of 18, the income earned from the transferred property is still attributed to you. This means there is no tax advantage in transferring the property. As well, if you dispose of the property for less than fair market value, a capital gain is also attributed back to you -- unless it qualifies as a rollover.

Income tax amendments made in 1981 now allow a farmer to pay his or her spouse a salary if he/she is active in the business. This means that the spouse will also be eligible for such programs as the Canada Pension Plan.

How Can My Farm Business Arrangements Affect My Tax Planning?

If a farm is organized as a corporation, it is important to realize that there are certain income tax rules that will not apply. For example, the five year block averaging provision, the $500,000 capital gains exemption, and the capital gains exemption on the principal residence cannot be used by a corporation.

On the other hand, some disadvantages of corporations and partnerships have been eliminated. Rollovers were previously not available for transfers of farm corporation shares or partnership interests, but now, these shares or interests *can* be rolled over to your child.

Individual farmers can now deduct salaries paid to their spouses, where previously they could do so only if they were incorporated. This means it is no longer necessary to incorporate so that you can pay your spouse.

Income tax rules are constantly changing, and you should review them periodically to ensure your tax strategies are up to date.

What Is Retirement Planning?

Planning for retirement includes preserving your estate, planning for the transfer of property to your beneficiaries, and providing for future income.

In providing for future income, an important tax strategy may be the registered retirement savings plan (RRSP). Sums paid into an RRSP from current income are tax deductible, so money accumulated in the plan is on a tax-free basis. However, any withdrawals from the plan are taxed in full at the time of withdrawal. Before you become 72, you must use the funds to purchase an annuity or a registered retirement income fund (RRIF).

The benefits received from registered retirement savings plans can supplement payments from the Canada Pension Plan, Old Age Security, and your investments. However, the Income Tax Act sets out specific RRSP contribution limits.

You can also establish a spousal RRSP -- where you pay into a registered retirement savings plan on behalf of your spouse. This strategy can reduce future income taxes on RRSP withdrawals because smaller sums of money will be taken from both plans, rather than just one plan. The tax rate is less on smaller sums.

As discussed earlier, rollovers of the farm can affect your retirement plans as well.

What Else Might Affect My Estate Plans?

According to the Dower Act, the spouse who holds title to the matrimonial home cannot dispose of it or mortgage it without the consent of the other spouse. As well, upon one spouse's death, the other is entitled to a "life interest" in the marital home. This means that he or she can live in the home until death. In the case of rural property, the "homestead" referred to in the Dower Act can include up to 129.6 hectares (320 acres) of land in addition to the home. As well, if a spouse gives up these rights under the Dower Act, he or she may still claim a division of property under the Marital Property Act.

This legislation may complicate your estate plans, particularly if the homestead is in a strategic location on the farm, if it is a small farm, or if your spouse survives you for a long period of time.

Sources Of Information

Ask for the following publications:

- **A Guide To Life Insurance For Manitoba Farmers**

  Available from:

  Publications Distribution Centre
  Manitoba Agriculture
  Room 805 - 401 York Avenue
  Winnipeg, Manitoba
  R3C 0P8 or phone 945-3846

  or your local agricultural office

- Guides and other publications

  Available from:

  District Taxation Office
  Revenue Canada
  391 York Avenue
  Winnipeg, Manitoba
  R3C 0P5 or phone 983-6350
  Toll-free 1-800-282-8079

Chapter 12
Questions And Answers About Your Will

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Your Will

What Is A Will?

A will is a legal document prepared by a person during life, indicating how he/she intends to distribute his/her property after death -- that is, who shall receive property and what interests they will receive. A will can be revoked (cancelled) during the person's lifetime. If there are any outstanding debts at the time of death, the person's property must first satisfy creditors before anyone else can benefit.

A woman who makes a will is called a "testatrix," and a man who makes a will is called a "testator." If you die without a will or your attempt to make a will failed because the will did not meet the legal requirements, you are said to have died "intestate." If you make a valid will but fail to include all your property in it, you have died "partially intestate" because you have only disposed of part of your property.

What Is A Beneficiary?

A beneficiary is named by the will-maker in his/her will as the person who will receive property upon the will-maker's death. A will-maker can name one or more people as beneficiaries.

Does A Will Have Any Legal Effect Before Death?

A will does not create any legal obligation during a person's lifetime. By signing a will, a person does not restrict, in any way, how he does business and disposes of assets during his lifetime.

A will is valid and takes effect only at the moment of death. In practice, a will can be changed as often as a person wishes during his/her lifetime, without affecting business and daily activities.

What Happens If Assets Are Given In A Will, But Have Already Been Disposed Of?

A person to whom a specific asset was given gets nothing if the property has already been sold or given away before death. For example, if you had made a will giving the north quarter to your brother, but you had already sold it, your brother would receive nothing.

What Kinds Of Wills Are Valid In Manitoba?

In Manitoba, the law recognizes two kinds of wills: "formal" and "holograph." A formal will is signed in front of two witnesses, and neither of the two witnesses or their spouses can benefit under the will. If a witness was to receive something, that gift would not be allowed, but the rest of the will would remain valid. A formal will can be handwritten, typed, or a combination of both.

A holograph will is completely handwritten by the testator or testatrix and signed at the end, but is not witnessed.

What Are The Requirements Of A Will?

There are three requirements of a valid will (formal or holograph):

- The will-maker must be at least 18 years of age (unless married or a member of the armed forces).
- The will-maker must be of sound mind.
- The will must be handwritten or typed on paper as an original; it cannot be on tape, or on a computer (computer disk or computer memory).

In some cases, a will could still be valid without all the requirements being met -- if the court is satisfied that the document represents the true intentions of the deceased. Any hint of duress or undue influence (someone trying to influence or put pressure on the will-maker) will make a will ineffective.

Should I Make A Will?

"Yes" is the simple answer to this question. There are several reasons why everyone should make a will:

- First, a will assures that your possessions will go to the persons to whom you wish, thereby minimizing family arguments. Without a will, you cannot control how your estate will be divided after your death.
- Secondly, a will can save money by avoiding the necessity of asking a court to appoint someone to administer your will if you die intestate. This request to the court will cost money and time.
- Thirdly, a will allows your estate to be distributed quickly and efficiently to the beneficiaries.

Do I Need A Will If I Am Not Married?

Even if you are single and have no children, you should have a will. Without one, your estate is automatically divided -- starting with your parents, brothers, sisters, grandparents, etc. You may have other relatives or close personal friends with whom you may wish to share your estate, and a will is the only way you can be most sure of doing so.

Does Life Insurance Take The Place Of A Will?

No. Life insurance is simply one of the kinds of property a person may own. It is a good idea to have your financial consultant, lawyer, life insurance agent and accountant work together to set up a proper life insurance program.

In a large estate, life insurance may be an important way to provide for the payment of capital gains taxes and other commitments.

Dying Without A Will

What Happens If I Die Without A Will?

If a person dies without a will (intestate), his/her estate is distributed according to the Intestate Succession Act.

What Share Does A Surviving Spouse Receive When There Is No Will?

The amount a surviving spouse receives depends on a number of factors:

- If there are no children, the surviving spouse receives the entire amount of the estate, regardless of the value of it.
- If all of the children are biological descendants of the intestate and the spouse, or have been adopted by them, the entire estate goes to the surviving spouse, again, regardless of the value of it.
- When *not* all the intestate's children are offspring of the surviving spouse, and the estate *is worth less than $50,000* -- the surviving spouse gets the entire estate.
- When *not* all of the children are offspring of the surviving spouse, and the estate *is worth more than $50,000 but less than $100,000*, the surviving spouse receives $50,000 plus one-half of the balance. The remainder would be split between children who are offspring *only* of the intestate. For example, if an estate is valued at $80,000, the surviving spouse would receive $50,000 plus one-half of $30,000 ($15,000), which would equal $65,000. The remaining $15,000 would be distributed equally between the intestate's biological and legally-adopted children. Any children from a previous union of the surviving spouse that have not been adopted by the intestate will not inherit anything. If any of the intestate's children have died first, their children would be entitled to their deceased parent's share.
- When *not* all of the children are offspring of the surviving spouse, and the estate *is worth more than $100,000*, the surviving spouse receives *one-half* of the original amount *plus one-half* of the balance (three quarters) of the estate. The remaining is distributed equally between the intestate's biological and adopted children.

What If A Child Has Been Conceived But Not Yet Born At The Time Of The Intestate's Death?

Children conceived before, and born after, the death of the intestate inherit as if they had been born in the lifetime of the intestate. For underage children, the estate would be put in trust and governed by the Infants' Estate Act.

What Happens When There Is No Will And The Intestate Spouse Has Already Died?

- If the first spouse had predeceased the intestate, and there are children, the property would be distributed equally between the intestate's children and adopted children.
- If there are no children, the entire estate would go the parents of the intestate in equal shares, or to the survivors of the parents -- brothers and sisters of the intestate, and their descendants.
- If there are no children, parents, brothers or sisters of the intestate, one-half of the estate goes to the paternal grandparents' side and the other half to the maternal grandparents' side (including descendants).

Are Relatives By Marriage Entitled To Inherit If There Is No Will?

Relatives by marriage are not considered as blood relatives, and therefore are not entitled to anything if the intestate leaves no will. Common-law spouses and illegitimate children are also in a particularly vulnerable position where there is no will, because the Intestate Succession Act does not consider a common-law spouse as a true spouse.

What If There Is No Will And No Blood Relations?

Where there are no surviving blood relatives, the estate will pass to the Province of Manitoba (the "Crown").

Distribution Of Assets

What Happens If A Couple Is Living Apart At The Time Of Death?

The amount that the surviving spouse would receive would depend on whether a distribution-of-property settlement had been reached and agreed upon. If so, the surviving spouse would be treated as a stranger, and receive nothing. The same would happen if one or both of the spouses had applied for divorce or distribution of assets under The Marital Property Act, and the application was pending at the time of the intestate's death.

Can A Spouse Be Disinherited?

The Dower Act prevents a person from disinheriting his/her spouse. No matter what the will says, the surviving spouse of the deceased has a right to the family home for the rest of his/her life. He/she will also receive at least one-half of the deceased's estate -- unless the will and/or insurance provides them with a lump sum of $150,000 plus a lifetime annual income of $10,000, *or* an annual life income of at least $15,000, *or* a lump sum of at least $250,000.

However, if the surviving spouse signed away his/her dower rights, he/she will be unable to take advantage of the provisions of The Dower Act. This would also apply if the surviving spouse was not living with the deceased prior to death because he/she deserted without just cause.

What If A Will Does Not Adequately Provide For A Family Member?

If a member of the testator's or testatrix's family feels that he/she has not been adequately provided for in the will, or under the Intestate Succession Act, he/she may apply to a court for additional benefits, based on the Testator's Family Maintenance Act. This situation usually arises due to special circumstances such as illness, handicaps, or educational needs. Note that if additional benefits are awarded, they cannot lessen what the surviving spouse gets under The Dower Act.

Can A Person Cut Their Adult Children Out Of Their Will?

Adult children can be cut out of a will, unless there are special circumstances that makes them dependant -- illness, handicaps, educational needs, etc.

What Happens If Both Spouses Die At The Same Time?

In Manitoba, whenever it cannot be determined which spouse died first, the law assumes that each person survived the other. Contrary to what happens in other provinces, property does **not** pass on to the spouse who was the youngest, and then on to his/her heirs. In this way, administrative and legal costs are reduced because the interim step of passing the estate to the younger spouse is omitted.

Preparing/Altering A Will

What Should Be Included In A Will?

What you wish to include in your will is a very personal matter; it can be very detailed, or it can be brief. However, your will should dispose of your entire estate to the beneficiaries you name. Otherwise, property that is not included will be distributed according to the Intestate Succession Act.

For the average married couple with children, the following should be included:

- survivorship clause in the event of the joint death of both husband and wife;
- the appointment of an executor/executrix;
- distribution of your estate;
- the appointment of a guardian for the children. (It should be noted that a court has the final decision as to who will be the children's guardian, and it is not obligated to follow your wishes.)

When you are drawing up your will, you should also consider the effect of federal and provincial tax legislation.

A will may not be the best place to state your desired funeral arrangements, or your wish to donate organs or body parts to science, because a will is usually not looked at until after the funeral. Instead, written funeral instructions should be given to your executor. The Human Tissue Act says that to donate some or all of your body parts to science, you must put your wish in writing, or state it orally in front of two witnesses, during your last illness.

How Do I Cancel Or Alter My Will?

A will can be changed or cancelled (revoked) as often as you wish. It can be revoked by intentionally burning, tearing, or otherwise physically destroying it, or by indicating in writing that you wish to revoke it. Once a will has been revoked it cannot be revived.

When changing a will, it is common practice to revoke the old will by making a statement to that effect in the new will. A will can also be amended (or revoked) by making a "codicil" (addition or change) to the old will.

How Often Should I Update My Will?

A will should be updated every few years, or as circumstances change. For example, a will or parts of it may no longer be valid if the will-maker marries or divorces after making it (unless the will specified that it was made in contemplation of that marriage or divorce).

What Information Does A Lawyer Need To Draw Up A Will?

When you go to a lawyer to have a will drawn up, you should take along:

- a list of all property you wish to give to particular people;
- a list of the names, addresses, and occupations of all beneficiaries;
- all members of the immediate family and those persons who will be appointed as executor/executrix and guardian(s) of children.

You will also have to provide your lawyer with your place of birth, citizenship, marital status, any marital agreements, and any other details that may affect the validity of your will.

Do I Need To Ask A Person If They Will Act As My Executor/Executrix?

It is a good idea to have the consent of the person you wish to name as executor/executrix. Otherwise, the person you name may decline when he/she finds out (after your death). At that point, a new executor/executrix may have to be appointed by a court.

Even the settling of a simple estate can involve a fair amount of time (usually at least a year) and paperwork, and a person may refuse to invest the time to act as executor/executrix.

How Many Executors/Executrixes Can I Select?

It is advisable to name more than one executor in your will, particularly if your estate is large and/or complicated. Alternates should be selected in the event of their death, or in the event that one or more moves out the province or the country.

What Does An Executor/Executrix Do?

Some of the duties of an executor or executrix include:

- making and paying all funeral expenses;
- getting official court permission to act on the deceased's behalf;
- providing for the immediate needs of dependants while the estate is being settled;
- determining what property belongs to the deceased, and taking immediate (but temporary) possession;
- filing the deceased's final tax returns;
- locating and confirming all beneficiaries;
- distributing the estate to the beneficiaries;
- preparing and getting court approval of the estate's final accounts.

In cases where a will doesn't name an executor or executors, or where the deceased has died intestate, a court will appoint a person to administer the will. If she is a woman, she is called an administratrix; if it is a man, he is called an administrator.

Can An Executor/Executrix Charge For Services?

Family members acting as executor/executrix do not normally charge a fee for their services; they only ask for reimbursement of any expenses they incur. However, an executor/executrix that is a non-family member normally requests a fee for the work involved in the administration of the estate, and is also entitled to be reimbursed for any money spent. The fee should depend on the nature of the estate and the amount of work involved.

What Is "Probate"?

Probate is a legal term meaning "proof." An executor or executrix must file a will with a court, as proof of its existence, before they can begin administering the estate.

What Are A Lawyer's Fees For Settling An Estate?

Lawyers' fees are set by the rules of court. In Manitoba, the fee schedule is:

- on the first $10,000 or portion thereof -- 3% of the value of the estate;
- on the next $90,000 or portion thereof -- 2% of the value of the estate;
- on the next $200,000 or portion thereof -- 1% of the value of the estate;
- over $300,000 -- fees should be based on time spent, complexity, skill required, results achieved, and amount involved.

Are There Any Probate Fees?

Manitoba assesses probate fees on the net value of the estate. The fee is $20, plus $5 per $1,000 in excess of $5,000. For example, for an estate of $100,000, the probate fees would be:

$$\$20 + \left(\frac{\$95,000}{\$\ 1,000} \times \$5\right) = \$495.00.$$

Where Should A Will Be Kept?

The important thing is that your will can be found by others after your death, so you may want to tell your executor/executrix, or a close friend or relative, where it is. A will should be kept in a safe place, such as a safety deposit box. Normally, banks, credit unions, caisse populaires and trust companies have safety

deposit boxes in which you can keep your will. A copy of your will may also be kept on file with your lawyer.

In Manitoba, you may take advantage of the Court of Queen's Bench and Surrogate Court Rules, which allow a person to deposit his/her will for safekeeping with the clerk of the court. The cost for this service is $25. Only you may remove or inspect the will during your lifetime.

What Is A Conditional Will?

A conditional will is intended to have legal effect only for the duration of a particular event or during a temporary state of affairs, such as a journey or a period of military service. Once the temporary state of affairs has passed, probate of a conditional will is refused.

What Is A Mutual Will?

Mutual wills are used to dispose of the property of two people who are testator/testatrix for each other -- usually a husband and wife -- who have agreed to pool their assets and dispose of them according to an agreed plan. Sometimes, persons who have made mutual wills agree not to alter or revoke them without the consent of the other.

What Is A Joint Will?

A joint will is similar to a mutual will, except only one document is used. This type of will should be avoided, since it cannot be changed without consent of the other maker. The consent of a deceased person is impossible to secure.

Are There Certain Things That Cannot Be Done In A Will?

There are some things a will cannot do:

- It cannot give away land unless you own the land outright.
- A will cannot give something away more than once ("to my husband until he dies, and then to my son").
- A will cannot impose on an inheritance any conditions that are against public policy ("to my daughter on the condition that she leaves her husband").

How Is A Will Contested?

If your spouse or one of your dependants is not satisfied with the portion they inherit under your will, he/she can apply to a court to have the will changed. A court has the power to vary the will if there is a serious need to do so (such as where an under-age or disabled child has not been adequately provided for).

What Happens If A Will Is Declared Invalid?

If a will is declared invalid, usually because it does not meet the necessary requirements, a court will look to see if there is an earlier will that is valid. If there is no valid will, the person will be deemed to have died intestate, and the estate will be divided according to the Intestate Succession Act. However, in some cases, a will may still be valid without the requirements being met -- if a court is satisfied that the document represents the true intentions of the deceased. Any hint of duress or undue influence will render a will ineffective.

For further information, see earlier sections on the requirements of making a will, and what happens when a person dies without a will (intestate).

Special Circumstances

Can My Family Or Friends Apply To Handle My Affairs If I Am Incapacitated?

Anyone wishing to assume responsibility for the affairs of a mentally-incompetent person must make application to a court. A lawyer is usually required to prepare the application, and his/her fees will be paid by the estate of the mentally-incompetent person. If appointed, the applicant will only have the power to handle financial affairs, and he/she must have financial records approved by the court on a regular basis. He/she cannot make any major decisions (such as the sale of real estate) without getting court approval first.

What Happens If No One Applies To Handle My Affairs If I Am Incapacitated?

If no one applies to become the "committee" (person who handles the affairs) of a mentally incompetent person, a court will appoint one. It could be a person, a trust company, or the Public Trustee of Manitoba. The committee would be responsible for making all decisions which affect the incompetent person's personal and financial interests -- including major decisions such as the sale of real estate.

The appointment of a committee is costly, and an alternative is to give an "enduring" power of attorney to someone. It can come into effect only if mental incompetence occurs, and its cost is small.

Why Should I Prepare In Advance For Incapacity?

Alzheimers disease, a stroke, or some other unfortunate event can cause mental incompetency, and you would no longer have the legal capacity to handle and manage your legal and financial affairs. If no arrangements have been made, no one will be able to make financial decisions regarding your affairs until a court grants someone the authority to do so.

It is possible to make arrangements in advance for the handling of your affairs in the event of illness or mental incapacity. This enables you to choose who you want to manage your affairs, and it allows you an opportunity to make your wishes clear to the person you have chosen.

There are two ways to make these arrangements:

- appoint a **power of attorney**;
- set up a **trust**.

What Is A Power Of Attorney?

A power of attorney is a document in which you appoint someone else to handle your legal and financial affairs. Because a power of attorney means giving up a great deal of power, it should only be granted to someone in whom you have complete faith and trust.

You can choose whether to appoint someone to handle all of your legal and financial affairs, or just some of them. For instance, you may want a power of attorney to be effective only for a particular real estate transaction, a specific period of time (such as your vacation), or only in the event that you are incapacitated.

A power of attorney automatically ends if:

- you die;
- you notify your "attorney" in writing that it is over;
- you become bankrupt;
- you become incapacitated, in which case a "committee" must be appointed -- unless it is specifically stated that your power of attorney is to handle your affairs in this circumstance.

What Is A Trust?

A trust is a way of having someone else responsible for managing all or part of another's financial affairs. When a trust is created, property is transferred to another person ("trustee"), who manages it and gives any benefits to a third party (beneficiary). There may be one or several trustees and/or beneficiaries.

Although the trustee "owns" the property, it must be managed in the best interests of the beneficiary. A trustee can receive a salary for managing the property, but cannot receive any other personal gains from it (unless the trustee is also one of the beneficiaries).

There are two basic kinds of trusts: An **inter vivos trust** comes into effect while you are still alive. It can be made orally or in writing. A **testamentary trust** comes into effect upon your death, and continues until the estate is dissolved or property is disposed of. It must be in writing.

You might wish to arrange for an inter vivos trust to manage the family farm in the event that you are incapacitated. You would probably name yourself, your spouse and children as beneficiaries. This allows you to provide for yourself and your family in an unfortunate circumstance, while eliminating the burden of managing the estate for your family.

Sources Of Information

Ask for the following publications:

- **Have you made a will?**

- **A death in the family?**

  Available from:

  Law Society of Manitoba
  219 Kennedy Street
  Winnipeg, Manitoba
  R3C 1S8

- **Information on Wills**

  Available from:

  Publications Distribution Centre
  Manitoba Agriculture
  Room 805 - 401 York Avenue
  Winnipeg, Manitoba
  R3C 0P8 or phone 945-3846

  or your local agricultural office

- **Wills and Estates**

  Available from:

  Community Legal Education Association
  202 - 379 Broadway Avenue
  Winnipeg, Manitoba
  R3C 3N9

Chapter 13
Family Law

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Family Law

Family law concerns any government intervention or regulation of families and relationships, such as marriage, separation, divorce, and child custody.

Marriage

What Are The Legal Requirements For Marriage?

Marriage is more than a personal matter between two people. It is a legally-binding contract, with mutual rights and obligations between the spouses.

To ensure that they are able to understand the contract, each person must have the required "capacity" to get married -- that is, they must be of a certain age and mental competence. If he/she is over 16, but under 18 years of age, the *written consent* of his or her parents, guardian, or a family court judge is needed. A person who has been certified as mentally disordered is unable to get married, unless a certificate is obtained from a psychiatrist.

Before a marriage can take place, a couple must obtain a license or have a "publication of banns" (a public announcement of the planned marriage) at a service of worship. It is no longer necessary to have blood tests.

A couple can be legally married by either a religious ceremony, or a non-religious ceremony, that is performed by a marriage commissioner. Names of marriage commissioners who are authorized to perform marriages in Manitoba are available from local court offices.

What Are The Rights And Obligations Of Spouses?

There are a number of mutual rights and obligations that arise during marriage. The most important are financial support, access to financial information, property rights, debt payment, and child care.

What Type Of Financial Support Must Be Provided?

The Family Maintenance Act states that both spouses have a mutual obligation to support and maintain each other while they are married and living together. These responsibilities can be met by maintaining a household and caring for children, or by working outside the home.

Spouses do not have an automatic right to each other's income. They may keep their earning separate, and spend their money as they wish. However, each

spouse is entitled to an allowance from the other, which may be used without interference from the other. Furthermore, the Criminal Code of Canada states that a married person must provide his or her spouse with at least the "necessities of life." This includes food, clothing, shelter and medical care.

What Type Of Financial Information Must Be Shared?

Marriage partners also have the right to request and receive financial information from each other while they are married. This could include copies of tax returns, and statements of wages, debts and liabilities. If one spouse will not provide this information, the other can apply to a court for an order requiring disclosure.

To What Type Of Property Does Each Spouse Have Access?

The Marital Property Act says that both spouses have an equal right to the use and enjoyment of family assets -- including the marital home or rented accommodation, even if it is in the name of only one spouse. If one spouse squanders an asset and places the financial security of the family in jeopardy, the other spouse can apply to the courts for an order to divide the assets. The family assets can be divided, even though the couple is living together.

Spouses do not automatically become co-owners of each other's property or business when they get married. However, each may acquire an interest in the *value* of the other's property or business, so that they become entitled to claim it if the marriage breaks down. For example, if the husband owns a small business, he retains ownership. However, his wife who works in the business, may claim an interest in it if they get divorced. He would have to pay it if a court rules in her favour.

Are Spouses Responsible For Each Others Debts?

Neither husband nor wife is responsible for debts incurred by his or her spouse -- unless they have co-signed the obligation. However, if one marriage partner is without financial support, he or she can pledge the other's credit to purchase the *necessities of life* -- until the other informs creditors that he or she will no longer be liable for such charges.

Are Both Spouses Responsible For Child Care?

The Family Maintenance Act states that both spouses are responsible for the financial support of their children. They also have equal rights to the custody, care and control of their children -- including the right to make decisions, such as where the child is educated.

What Is The Purpose Of A Marriage Contract?

Formal and written marriage contracts have not been widely used, but are now becoming more popular. They are legally-binding contracts, and are subject to the law of contracts. For this reason, a couple may wish to consult a lawyer about the terms they have included. Marriage contracts can have a positive effect on each person's awareness of the responsibilities of marriage, and the desires and expectations of the other partner.

Possibly, the most important reason to enter into an agreement is to settle property rights between spouses. Although there are laws that govern the division of marital property, a valid marriage contract can be used to alter this division.

Are There Limitations To A Marriage Contract?

There are limitations to marriage contracts. A couple should realize that in order for it to be enforceable, no term of the agreement can be found contrary to public policy. For example, neither person can make a contract providing for future separation. As well, they should remember that terms providing for personal services (such as who will do the laundry or the dishes) are not enforceable by the courts.

As well, a court is not strictly bound to follow the terms of a marriage contract upon marriage breakdown. While there is a tendency to enforce the contract where possible, a court will not be bound by anything concerning children. Instead, it will make decisions based on the "best interests of the child," and not the wishes of the parents.

Marriage Breakdown

What Can A Couple Do When Their Marriage Breaks Down?

When a marriage breaks down, the spouses may simply separate or they can obtain a divorce. After a separation, the marriage still exists. A divorce, however, will legally end a marriage.

How Does A Couple Become Legally Separated?

There are several ways for a couple to become legally separated. They may simply **stop living together** and go their separate ways ("de facto separation"). They may write out a **separation agreement**, either by themselves, or with the help of lawyers. Or, the couple **can go to court** and ask for a "judicial separation."

What Is A Separation Agreement?

When a couple separates, their mutual obligations for support and maintenance do not automatically end. Therefore, they may decide to make a written separation agreement, which is a legally-binding contract that outlines the changes they wish to make in the mutual obligations that each owes to the other.

Separation agreements usually deal with:

- financial arrangements for a dependent spouse;
- custody, access, and maintenance of children;
- division of property and release of rights, subject to applicable legislation;
- the right to live in the marital home;
- responsibility for debts.

However, a separation agreement may contain anything that a couple wishes to include, as long as the terms are not against public policy.

A separation agreement has several advantages over a court order. For example, it can contain the smallest details, and it also avoids a court case and the cost of legal fees. However, if a separation agreement is going to work out, the parties must be willing to co-operate with each other. If there is any doubt that either party will not hold up his or her end of the bargain, it would be better to get a court order. If the spouse paying alimony has a history of default, or one is worried that the other will try to take the children away, the agreement will not work. A mutual trust between the parties must exist in order for the agreement to be effective.

Generally, if a spouse defaults on his or her obligations under a separation agreement, the other may go to court to have it enforced. Since the courts wish to encourage the use of these type of agreements, they will usually uphold it.

A court cannot vary the terms of these agreements -- either the entire agreement is upheld or disregarded. However, there is one exception, and that is where children are concerned. If the terms are not in the best interests of the children, the court may uphold the rest of the agreement and simply substitute new terms concerning the children.

What Happens If The Separation Agreement Is Not Voluntary?

A court will not uphold a separation agreement if there has been "undue influence" exerted by one spouse, if a spouse was under "duress," or if one spouse had an "unfair advantage." If there has been undue influence, it means that the agreement was not voluntary. If a spouse is under duress, it means he or she was forced to sign -- for example, when a woman signs an agreement because her husband threatens her safety. If one spouse had an "unfair advantage," it means that both people were not in equal bargaining positions due to the need, ignorance, or distress of the other person.

What If A Spouse Does Not Provide The Support He/She Agreed To?

The maintenance provisions of a separation agreement can only be enforced through the Maintenance Enforcement Program (see "Divorce") if the agreement provides for this. Therefore, a dependent spouse may wish to apply for a court order confirming the agreement, or he/she could apply for a court order instead of an agreement, if there is a problem in obtaining an agreement.

What Is A Court Order Of Separation?

A court order of separation is similar to a separation agreement in that it provides an arrangement for a couple to live apart. However, it is in the form of an order from a court. The most important reason for obtaining a court order of separation is to be able to enforce support and maintenance orders, and secure property rights. A court order may also include provisions regarding support, living arrangements, custody of children, or any other order a court decides is appropriate.

A court order is easier to enforce, and therefore more effective, than a separation agreement. If one party defaults on a court order, he or she will receive a

summons to appear in default court. Also, a charge of contempt of court may result from not obeying a court order. Such consequences add incentive for obeying.

After separation, each spouse has the obligation to attempt to become financially independent of the other. However, if one spouse cannot do so, the court will order that the other make reasonable payment for support. If both spouses agree, the court will do so without hearing any evidence. However, if the application is contested, the court will hear the evidence of both parties and their witnesses. When a person seeks a court order of separation, it is not necessary to prove fault or establish grounds to obtain the order. In fact, the spouse who caused the marriage breakdown can make the application.

How Is Maintenance Awarded In A Court Order?

Under the Family Maintenance Act, a court does not look at the fault or conduct of the parties when deciding how much maintenance to award. Instead, it considers these factors:

- financial needs of each spouse;
- earnings and earning capacity of each;
- standard of living during marriage;
- obligations for support of children or persons other than the spouse;
- child care and domestic services provided by each spouse;
- amount of property settlement;
- how easily one spouse can become financially independent of the other;
- impairment of income earning capacity resulting from marriage;
- whether the dependent spouse is attempting to become financially independent;
- how long the marriage lasted.

It is important to note that if one spouse did housework, domestic services, or looked after the children, this is considered as contributing to the support and maintenance of the other.

The Family Maintenance Act says that each parent must support his or her children, and provide for their maintenance and education until the children reach the age of 18. If a parent marries a second time, the new husband or wife has an obligation to help support the children of the first marriage while they are in his or her custody, and until they are 18. However, the natural parent who does not have custody still has an obligation towards the children.

In deciding how much a spouse must pay the custodial parent for the support of the children, a court looks at the cost of food, clothing, accommodation, housekeeping, recreation, and supervision of the children. It also looks at the need and cost of providing a stable environment, as well as the financial circumstance of each parent.

If the circumstance of the spouses change, the Family Maintenance Act also allows either one to apply for a review and variation of the court order. An application can also be made to add new provisions.

Divorce

What Is Divorce?

A divorce is a declaration by a judge that a marriage is legally over. This means that the couple is no longer married as of the date the divorce takes effect, and any laws that apply to married people are no longer in effect. For example, the law that says a married person cannot marry anyone else while his or her spouse is alive, will no longer apply.

Divorce is different from both nullity and separation. A nullity decree means a marriage never really existed, while separation means the marriage has not yet ended.

In Canada, divorce is covered by the federal Divorce Act. Recently, divorce laws in Canada were reformed to make a divorce somewhat easier to obtain.

How Do People Get A Divorce?

To obtain a divorce, one of the spouses must go to court and "petition" (ask) the court to listen to his/her case. A date is set for a court hearing, and finally, for appearing in court.

Spouses cannot simply agree to a divorce. Instead, they must prove the existence of at least one of the reasons for "marriage breakdown" set out in the federal Divorce Act. To do this, each spouse may bring in witnesses and documents to explain his/her side of the story.

The person suing for divorce is called the "petitioner" and the person being sued is called the "respondent." If the petitioner is suing because of adultery, the person with whom the respondent is supposed to have been unfaithful is called the "co-respondent."

After hearing all of the evidence, the judge will decide whether or not to grant the divorce. However, if granted, it will be 31 more days before it takes effect. This waiting period is to allow both parties some time to reconsider before the divorce becomes final. As well, it leaves the court some time to ensure that the evidence is legitimate, and that none was overlooked. Only once the waiting period has expired is the marriage dissolved.

It should be noted that in special circumstances, and if both spouses agree, the 31-day waiting period may be shortened.

If provisions for maintenance or support are included in the final divorce order, any previous court orders -- including a separation order -- will stop being effective. If the court does not deal with these matters, the provisions in the separation order will continue.

What Are The Grounds For Divorce?

There is only one ground for divorce -- "marriage breakdown" -- which can be shown to exist in a variety of ways -- including "adultery," "cruelty," or "living separate and apart." Separate and apart means the parties must live separate lives for a minimum of one year before the divorce. With adultery or cruelty, the petitioner has to have proof. As a result, most people choose to simply wait the required year.

The words "separate and apart" do not simply refer to physical separation. There must be a rejection of the marriage relationship and a withdrawal from marital obligations. The required one year separation begins when this rejection occurs, and not when actual physical separation begins.

It is not necessary that the couple live in separate dwellings to be considered separate and apart. However, if they live under the same roof, the court will analyze their living arrangements. If the spouses occupy separate bedrooms, have no sexual intercourse, communicate very little with each other, and do not perform any domestic duties for each other (such as cooking, shopping, or laundry), a court will usually find them to be living separate and apart.

Can A Divorce Be Refused?

Besides a lack of proof of cruelty or adultery, there are other circumstances that will bar a divorce. They are **collusion, connivance** and **condonation**.

Collusion refers to an agreement or conspiracy between the parties to suppress evidence or deceive the court. For example, an agreement where the parties decide that one will go out and commit adultery so that they can get a divorce, would probably be collusion. Collusion is an absolute bar to divorce, but does not last forever. If the court bars one petition, a new one can be presented later if there is valid proof for divorce.

Connivance is the act of knowingly allowing a matrimonial offense to be committed, and applies only to adultery and cruelty. An example of connivance would be if the petitioner knows his or her spouse is about to commit adultery, and says: "Go ahead, I don't care."

Condonation refers to the innocent spouse forgiving the other spouse for a matrimonial offense, with full knowledge of all the circumstances of the offense. It only applies to cruelty and adultery, and may result in the dismissal of the petition. Taking a spouse back and **forgiving** him or her is condonation; returning to living together with the intention of working on the problems and possible reconciliation may not be condonation.

Can A Divorce Order Be Changed?

If the circumstances of the people change, an application can be made to have the divorce order varied. Variations usually deal with maintenance, custody, or visiting privileges.

How Is Marital Property Divided Upon Divorce?

The Marital Property Act provides that all assets and property acquired by a couple during marriage will be shared equally by them in the event that the marriage breaks down. This applies no matter how the parties have behaved; conduct is irrelevant.

The "net value" of assets is calculated by subtracting any outstanding debts from the total property value. If one spouse wishes to keep a certain asset, he or she will still have to pay an amount equal to half the value of that asset to the other spouse.

The Marital Property Act includes assets acquired prior to, but in specific contemplation of marriage. If these assets have increased or decreased in value during the marriage, this change will be taken into account. Any assets located outside of Manitoba cannot physically be shared. As with other joint assets, their value will be taken into account in determining how they should be divided.

If one spouse gives away, foolishly loses, or wastes an asset of high value, he or she will have to account for it by paying half of its value to the other spouse, even if he or she no longer owns it. For example, one spouse cannot sell the family cottage to a friend for $1, simply to prevent sharing its value with his or her spouse.

The money from an award of damages, or settlement on an insurance claim, received by one spouse for a personal injury does not have to be shared. Gifts exchanged between spouses are shareable assets, but gifts or inheritances from a third person to one of the spouses are not shareable -- unless they were *intended* to be a gift to both. If one spouse is the sole owner of specific goods, he or she will remain the owner.

There are two types of joint assets under the Marital Property Act -- **family** assets and **commercial** assets. The *net value* of both these assets is calculated, and then equally divided. (Net value is the total value minus any outstanding debts.)

What Is Included In Family Assets?

A family asset is any asset owned by one or both spouses, and used for shelter, transportation, household, educational, recreational, social, or aesthetic purposes. Examples of family assets would be the marital home, the family car, furniture and appliances, and savings accounts. These are generally divided equally between the spouses.

One of the most important family assets is the marital home, which is any property used as a family residence. It may be owned or rented by one or both spouses, and may include a house, apartment, trailer, or condominium. Under the Dower Act of Manitoba, where both spouses are registered as the owners of the marital home, *both* must agree in writing to its sale, mortgage, or any other transaction. Where the marital home is owned by only one spouse, the written consent of the other is required before there can be any transaction. However, after six months of separation, this consent is no longer needed, but a court may attach conditions to the transaction in order to protect the non-owning spouse.

What Is A Commercial Asset?

Commercial assets are any non-family and non-personal assets -- such as an interest in a business, investments, and pension schemes. Each spouse has the right to an equal share of commercial assets at the time of a marriage breakdown, but a court could change this if an equal division is clearly unfair.

What Type Of Asset Is A Farm?

The unique nature of a farm makes it *both* a family asset and a commercial asset.

The farm house, and that part of the farm land necessary for the use and enjoyment of the house, is considered to be a marital home. Therefore it is a family asset, and its value will usually be divided equally upon marriage breakdown. Special protection given by the Dower Act applies to the farm dwelling and 129.5 hectares (320 acres) of farm land.

The remainder of farm property is a commercial asset. Therefore, both spouses have the right to an equal division, subject to the court's discretion. However, if the farm was purchased before the marriage, it is not a shareable asset -- unless it was purchased in contemplation of marriage. Any increase or decrease in the farm's value after the date of marriage, though, must be taken into account.

A farm that was acquired by inheritance or was a gift to one of the spouses is not shareable -- nor is the increase or decrease in value in this case.

Who Can Live In The Family Home?

The Family Maintenance Act allows either spouse to apply for a court order allowing him or her to live in the marital home alone, even if the other spouse is a joint or sole owner of the home. A court may also postpone any sale of the home where such an order has been made.

What About Children?

The Divorce Act recognizes that spouses have a *joint* financial obligation to support a child, and that this obligation should be proportionate to the relative financial abilities of each spouse.

A parent is obliged to provide maintenance for his or her children until they are 18 years old, and for a longer period of time if the child is unable to support him or herself. For example, a child would be unable to support him or herself if physically or mentally disabled, or if still furthering his or her education. In cases like these, there is no maximum age at which a child automatically ceases to be entitled to maintenance.

To determine who should have custody of, and access to (visiting rights) a child, a court will look out for the child's best interest.

What Is Custody?

"Custody" is a broad term that includes the responsibility for the physical control and day to day care of a child, as well as the right to direct the educational, religious, social and other aspects of a child's upbringing.

There are several different types of custody orders that may be granted. "Sole custody" means that one parent has exclusive custody, care, and control of a child.

"Alternating custody" means that a child is placed in the custody of one parent for part of the year, and in the custody of the other for the rest of the year. For example, a child may spend the summer with his/her mother, and the rest of the year with his/her father.

"Joint custody" means that both parents continue to share full responsibility for the child's upbringing, and for the decisions that affect the child's life. While the physical care and control will be restricted to only one parent, the other will have an equal part in the decision-making aspects of the child's life.

In custody matters, the parents' rights are secondary to the welfare of the child. The child's own views and preferences may be considered, if the judge is satisfied that the child understands the nature of a custody order. Both spouses have an equal right to obtain custody -- there is no presumption that a mother will be favoured over a father.

The parent's behaviour towards each other is not an issue in custody matters -- unless that behaviour shows that a parent cannot care for the child. For example, a wife who commits adultery does not disentitle herself to custody; the court does not ask that a good mother also be a "good" wife. It is the welfare of the child that is the most important factor.

What Happens When A Parent Abducts A Child?

Under the Criminal Code of Canada, it is a crime when one parent takes a child under 14 without the other parent's consent. The purpose of this law is to protect a child's right to security, continuity and stability in his/her life. A parent can be arrested and fined, or sent to jail, for abducting his/her child -- even if there is no custody order.

Under provincial (civil) law, when there is a custody order, a court may order a peace officer, a police force, a child protection agency, or all three, to locate, apprehend and deliver the child to the person named in the order (the guardian). If there is no order, the parent who was caring for the child must apply for an interim custody order before any action can be taken by a court. In certain situations, the abducting parent can be prosecuted. However, the penalties are not as severe as those under the Criminal Code.

Whether an abducting parent is prosecuted under the Criminal Code or under civil law depends on the circumstances of each particular case.

What About Custody Orders From Other Provinces?

All Canadian provinces now have laws that enforce custody orders from other jurisdictions. If a child has been taken from one province to another, courts can order the police or child care agencies to find the child and return him or her to the custodial parent.

To help locate abducting parents, the Uniform Custody and Jurisdiction Enforcement Act of Manitoba allows a court to apply to provincial and federal information banks (such as social insurance numbers), and to pass this information along to the police or child care agencies. However, to protect confidentiality, only a court can apply for this information -- and not individuals.

Under the Uniform Custody and Jurisdiction Enforcement Act, Manitoba courts will not hold full custody hearings or grant new custody orders to abducting parents moving here from other provinces. The only exception is if children are in risk of immediate harm if returned to the custodial parent, or if they have a substantial connection with Manitoba and it is important they stay *here* (and not in the province that issued the original custody order).

Recently, the Hague Convention on the Civil Aspects of International Child Abduction was signed between several countries, to deal with the problem of international child abduction. It is law in Manitoba. This means that Manitoba civil courts can take action if a child is taken out of Canada. If the country to which the child is taken has also signed the convention, the Canadian custody order will be enforced.

For further information on international abduction, contact the Manitoba Attorney General's department (945-2841) or Child Find Manitoba Inc. (831-5678).

What About Visiting Rights?

Visiting rights are a result of a court order called an "access order." Enforcing access orders can be a problem, and that's why Manitoba has implemented the new Access Assistance Program to resolve these problems. The overall focus of the program will be to provide a preventative and protective service, based on the idea that usually the children's best interests are served by contact with both parents after separation or divorce.

Voluntary mediation is offered to both parents to help them work out the problems of access. If mediation fails and there is an access order in existence, the Access Program Co-ordinator will then assess the case to find out the nature of the problem and its impact on the children, and then will try to develop a plan with the parents. If this does not work, the non-custodial parent can use contempt proceedings, although the emphasis of the program is on conciliation. (Contempt proceedings would involve the filing of a motion and appearance before a Judge where, the non-custodial parent would point out to the Judge the failure of the custodial parent to obey the court order.)

Will A Divorce Court Deal With Maintenance?

After the divorce has been granted, a court may order one spouse to pay the other maintenance money. It can be either as a lump sum or as periodic payments.

Neither spouse is automatically entitled to receive alimony or maintenance from the other. The Divorce Act sets out the following reasons that maintenance might be ordered:

- Economic advantages or disadvantages may arise from marriage or marriage breakdown. For example, if a woman helped to support her husband through university, she may be entitled to payments that will enable her to do the same upon their marriage breakdown.

- Financial consequences may arise from the care of the child(ren), and they must be divided between both spouses. For example, if a woman has stayed at home with young children to provide care for them, she will have forgone time in the work force, and will have missed pension benefits, and career advancement. She could be compensated for this.

- Economic hardship of either spouse arising from breakdown of the marriage should be relieved; and self-sufficiency between spouses should be promoted. This means that a court will be more inclined to make temporary or time-limited orders for maintenance, with an emphasis on each spouse becoming financially independent of the other. (However, courts do recognize that the economic advantages and disadvantages of marriage do not always fall on each spouse equally, and there may be differences in how rapidly each can become independent.)

How Much Maintenance Can Be Ordered?

The amount of maintenance will depend on the economic advantages and disadvantages arising from the marriage or its breakdown, the consequences of caring for children, and the promotion of self-sufficiency. In addition, a court will look at the length of the marriage, the standard of living throughout the marriage, the needs of the spouse applying for maintenance and his or her ability to achieve economic self-sufficiency, and the ability of the other spouse to pay support.

Unless it is otherwise ordered or agreed, maintenance payments will cease upon the remarriage of the spouse receiving them. However, if the spouse making the payments remarries, he or she is still obligated to support the first spouse.

How Can Maintenance Orders Be Enforced?

In Manitoba, maintenance orders can be enforced through the Maintenance Enforcement Program, operated by the Manitoba Attorney General's department. Maintenance orders issued after January 1, 1980 are automatically enrolled in the program and are monitored by computer. The computer will take note of any default in payment of maintenance, allowing enforcement of proceedings to be immediately started on behalf of the recipient. Orders issued before January, 1980 can be enrolled in the program by filing the appropriate form with a court.

Manitoba has also entered into an agreement with the other provinces and with other countries to enforce orders of maintenance when the defaulting spouse moves out of a particular jurisdiction.

For further information, contact:

The Maintenance Enforcement Program
9th floor - 405 Broadway
Winnipeg, Manitoba
R3C 3L6
945-7133.

Common-Law Unions

What Is A Common-Law Union?

A common-law union is a situation where a man and a woman live together as husband and wife, but are not actually married. Certain rights and responsibilities arise in this type of relationship.

What Are The Support Obligations In A Common-Law Relationship?

If a couple has lived together for at least a year, and there is a child as a result of the union, then the rights and mutual obligations for financial support are the same as for married persons, and the Family Maintenance Act will apply to their situation. The obligation is to provide reasonable necessities of life to the dependent spouse. As well, each parent has an obligation to provide for a child's support until the child reaches the age of 18 (and beyond 18 if the child is unable to provide for him/herself). However, support obligations for a spouse and child will only be ordered by a court if an application to the court is made while the couple is living together, or within one year after separation.

In a situation where there are no children, there is a mutual obligation to provide support if a man and woman have lived together for at least five years.

What Are The Property Rights Of Each Common-Law Spouse?

If the common-law partners have been living together for over a year and they have a child, the "spouses" have the same rights regarding occupancy of the family home as legally married persons. As well, one spouse can apply for a court order to keep the other spouse from entering his/her premises, or annoying him/her upon break up of the relationship.

If there is other property held in both names, there will be no problem with division of it on the breakdown of the relationship. However, if there is property held in the name of one person only, he/she will retain all rights to the property, as the Marital Property Act does not apply to sole ownership.

There has been some change in legal thinking, though, in recent years. In a recent decision of the Supreme Court of Canada (the highest court in the land), a common-law "wife" was found to be entitled to a portion of a farm held only in the name of the "husband." The wife contributed to the acquisition of the farm assets in the early years of their relationship by using her money to pay for the household expenses, thereby allowing the husband to save his money. A farm was later purchased with that money. After the purchase, the wife contributed

money for repairs, as well as the necessary labour for the new enterprise. Because of these contributions, the supreme court held that an equal division of the farm assets was appropriate, so as to prevent the unjust enrichment of the husband.

What About Child Custody?

If the parents of a child are **not living together** in a common-law relationship, the mother is automatically the guardian of the child -- unless a court orders otherwise. A court will only make such an order if the mother is grossly unfit as a parent. However, the father of the child does have a right to apply for custody, and a court will consider the best interests of the child in making its decision. Both natural parents are responsible for maintaining the child until he/she is 18 years old, but for this responsibility to be effective, the father must know he is the father.

If the parents have **lived together after the birth of the child**, both have equal rights to custody and control of the child -- unless there is a court order giving custody to only one parent.

If the parents have **separated since the birth of the child**, the child is in the custody of whichever parent he or she currently lives with -- unless a court orders otherwise. Court orders of custody and access will be determined by the same process as for married persons. That is, the primary consideration will be the best interests of the child.

Divorce And Pension Plans

Are Canada Pension Plan Benefits Shared At The End Of A Marriage?

Pension credits earned by one or both spouses under the Canada Pension Plan (CPP) during the marriage may be divided equally between them upon divorce, in order to protect the spouse who did not work outside the home. However, the spouses must have lived together for at least 12 consecutive months. Any credits earned while the couple lived together in a common-law relationship prior to marriage will also be included in the division.

No application is required. The division will be made automatically -- as soon as the necessary information has been received by the Minister of National Health and Welfare.

What CPP Rights Have Common-Law Separations?

The couple must have lived in a common-law relationship for at least 12 consecutive months, and the separation must have lasted at least 12 months. At that point, a division of CPP can be applied for. It must be done within four years of the break up of the relationship.

In all cases, if both "spouses" have signed an agreement limiting or eliminating their claim to pension credits prior to June 4, 1986, the division of credits may be prevented.

What About Other Pension Plan Benefits?

Most non-CPP pensions of Manitoba residents are governed by the Manitoba Pension Benefits Act. This means they will be divided when there is a court order for the division of family assets, or when the parties have entered into a legal settlement or a separation agreement dealing specifically with pensions and/or marital property. The value of the pension benefit is calculated as if the pension plan member had terminated employment on the date of the termination of the marriage.

The Pension Commission of Manitoba can advise a person whether or not his/her spouse's pension is subject to the Pension Benefits Act. For further information, contact:

Pension Commission of Manitoba
1004 - 401 York Avenue
Winnipeg, Manitoba R3C 0P8
Phone: 945-2740.

According to the Pension Benefits Act, a spouse cannot waive his/her right to apply for a division. This means it cannot be "traded" for another family asset or a cash payment.

In some cases, the pensions of Manitoba residents fall under federal jurisdiction. If so, then the division process is governed by the Marital Property Act of Manitoba. According to this legislation, pensions are divided according to a formula that takes into account the length of the marriage relationship. It will not allow for a division in a common-law relationship.

Family Violence

What Is Spousal Abuse?

Spousal abuse refers to either wife or husband abuse, and includes common-law "spouses." It involves physical or mental abuse. Physical abuse may refer to one of a number of things -- sexual assault, beating, or throwing objects. Mental abuse includes threatening and verbally abusing the other spouse.

What Protection Is There For Spousal Abuse?

There is protection in both the criminal (federal) and civil (provincial) law systems. The criminal law system punishes those who have committed abuse, while the civil law system settles disputes and provides protection. In many cases of spousal abuse, the use of both systems is often necessary. In addition, there are agencies that provide assistance and shelters to victims, so that they have a place to go.

Is Spousal Abuse A Crime?

Spousal abuse is a crime. In Manitoba, police officers lay charges in cases where a person has been physically assaulted by his or her spouse, regardless of whether or not there are any witnesses other than the victim. Once charges are laid, the matter will proceed to criminal court unless there is a reason it should not. The victim does not have the right to drop the charges or stop the proceedings, and cannot be bullied into doing so. If convicted, the abuser will be punished according to the seriousness of the crime and previous criminal records. Punishment may include a prison sentence.

How Can A Threatened Spouse Prevent Abuse?

A spouse who is being abused or fears abuse may apply to court for an order of protection. Such an order is intended to prohibit the abusing spouse from molesting, annoying, or harassing the other spouse, or from entering his/her residence or place of employment. Generally, the procedure for getting an order requires giving notice to the abusing spouse, so that he/she may appear in court to defend him/herself. However, as is often the case when the matter is urgent, a temporary order (called an "ex parte order of protection") may be granted without notice. In addition, an order may be granted giving the victim sole right to occupy the family home -- even though the abuser may be a sole or part owner.

What Is Child Abuse?

Child abuse can be physical or emotional, by either a parent or another person. Physical abuse refers to any injury inflicted on a child, or a sexual assault upon a child. Emotional abuse includes any action that may result in psychological problems.

What Can Be Done For An Abused Child?

If you have reason to believe a child is suffering from neglect or abuse, the law says you *must* report it to a child-caring agency immediately. Under The Child and Family Services Act, the agency will then have the right to enter the home to investigate. It may take any steps necessary to protect the child, including removal from the home.

Within four days of removing the child, the agency must apply to court for a hearing date to get an order of guardianship. If the parent wishes, he or she can attempt to show why an order of guardianship is not necessary. At the hearing, witnesses will be called and evidence brought in, and a judge will then decide if the child needs protection. He/she will choose one of the following:

- Issue an **order to return the child** home.
- Issue a **supervision order**, where the child is returned home, but the child care agency may enter the home to supervise the care of the child.
- Issue a **guardianship order**, where the agency becomes the guardian of the child, but the parents have visiting rights (unless the judge says otherwise). If it is a temporary order, the agency and the family are expected to work together to resolve any problems in the home. Once problems are solved, either the parents or the agency may apply to have the order terminated.
- Issue a **permanent order**, where the parents will no longer have any rights or responsibilities with respect to the child. It is entirely within the discretion of the agency whether or not to allow the parents to visit the child.

Any of the above orders may be appealed to the Manitoba Court of Appeal within 21 days of the decision.

Who's Duty Is It To Report Child Abuse?

The duty to report child abuse applies to everyone, even where the information is acquired within a confidential relationship -- except between lawyer and client. The information can be supplied with or without the consent of parents or guardians. The name of an informant cannot be revealed without his/her written consent, except in the course of judicial (court) proceedings. It is an offense for anyone to interfere with or harass an informant for providing information.

Sources Of Information

- **Family Law in Manitoba (1985)**

  Available from:

  Attorney General
  Law Courts
  Broadway at Kennedy Street
  Winnipeg, Manitoba
  R3C 0V8
  phone: 945-2084

- **Family Law (second edition)**

  Available from:

  Public Legal Education Association
  Faculty of Law
  University of Manitoba
  Winnipeg, Manitoba
  R3T 2N2
  phone: 261-4347